# ASSESSMENT OF CREDIBILITY

# IN THE CONTEXT OF CRDD HEARINGS

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## FOREWORD

The process of determining whether a refugee claimant has a well-founded fear of persecution within the meaning of the definition of "Convention refugee" in section 2(1) of the *Immigration Act* is one that requires the decision-makers to decide whether they believe the claimant's evidence and how much weight to give to that evidence. In determining this, they must assess the credibility of the claimant, other witnesses and documentary evidence.

## 1. GENERAL PRINCIPLES AND OBSERVATIONS

### 1.1. Credible or Trustworthy Evidence

Assessment of credibility is guided by a number of principles that have been adopted in the jurisprudence. The process is made more difficult by virtue of the fact that the legal or technical rules of evidence used in the courts do not apply in the CRDD context. The *Immigration Act*, in section 68(3), states:

> 68.(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.

It is not open to members of the Refugee Division to base their decision on sheer conjecture or mere speculation.[1] Nor can evidence be rejected simply because it is hearsay: reasons must be provided for considering such evidence to be untrustworthy.[2]

The Court of Appeal stated in *Maldonado*[3] that when a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness. An important indicator of credibility is the consistency with which a witness has told a particular story.[4]

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1 *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 183 (F.C.A.); *Canada (Minister of Employment and Immigration) v. Satiacum* (1989), 99 N.R. 171 (F.C.A.); *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993. In *Satiacum, supra*, at 179, MacGuigan J.A. cited Lord Macmillan, in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39, at 45, 144 L.T. 194, at 202 (H.L.) for an explanation of the distinction between reasonable inference (which a decision-maker is entitled to draw) and pure conjecture (which is not permissible):

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

In *Mahalingam v. Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm. L.R. (2d) 210 (F.C.T.D.), the Court found that the panel, which had used words such as "we feel", had made a speculative finding—for which it cited no evidence—that the police would not again humiliate or harass her.

2 *Yabe, Said Girre v. M.E.I.* (F.C.A., no. A-945-90), Hugessen, Desjardins, Létourneau, March 17, 1993; *M.E.I v. Boampong, Sheikh Jedges* (F.C.A., no. A-1219-91), Isaac, Marceau, McDonald, August 6, 1993.

3 *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.).

As for the standard of proof, the Federal Court of Appeal pointed out in *Orelien*:[5]

> one cannot be satisfied that the evidence is credible or trustworthy, unless satisfied that it is probably so, not just possibly so.

### 1.2. Consistency on Findings of Credibility

The credibility and probative value of the testimony have to be evaluated in the light of what is generally known about the conditions and laws in the claimant's country of origin,[6] as well as the experiences of similarly situated persons in that country.[7]

The Federal Court has cautioned, however, that "[t]here can be no consistency on findings of credibility." Credibility cannot be prejudged and is an issue to be determined by the members in each case based on the circumstances of the individual claimant and the evidence.[8]

Credibility findings have to be explained and must be supported by the evidence. (This is discussed in 2.2. Making Clear Findings on Credibility and Providing Adequate Reasons for Such Findings.)

### 1.3. Benefit of the Doubt

The *Handbook on Procedures and Criteria for Determining Refugee Status*[9] provides the following guidance:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. ... Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.

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4 *Dan-Ash v. Canada (Minister of Emplyment and Immigration)* (1998), 93 N.R. 33 (F.C.A.).

5 *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 605, per Mahoney J.A.

6 *Sathanandan* v. *Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 310 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.); *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

7 *Chaudri* v. *Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.); *M.E.I. v. Jawhari, Sari* (F.C.T.D., no. T-1477-92), Denault, December 16, 1992; *Handal, Sandra Iris Rencinos v. M.E.I.* (F.C.T.D., no. 92-A-6875), Noël, June 10, 1993.

8 *Oduro, Ebenezer v. M.E.I.* (F.C.T.D., no. IMM-903-93), McKeown, December 24, 1993. See also *Santizo, Carlos Ulin v. M.E.I.* (F.C.T.D., no. IMM-1093-93), Gibson, April 22, 1994.

9 Issued by the United Nations Office of the High Commissioner for Refugees, Geneva, January 1988.

This principle was discussed by the majority and dissenting judgments of the Supreme Court of Canada in *Chan*.[10] The majority found that, where the claimant's allegations run contrary to the available evidence and generally known facts, it is not appropriate to apply the benefit of the doubt in order to establish the claim. In reaching this conclusion, the majority stated:

> My colleague, La Forest J. argues that no conclusions can be drawn from individual items of evidence and that on each item the [claimant] should be given the benefit of the doubt, often by considering hypotheticals which could support the ... claim. This approach handicaps a refugee determination Board from performing its task of drawing reasonable conclusions on the basis of the evidence which is presented. This approach is also fundamentally incompatible with the concept of "benefit of the doubt" as it is expounded in the UNHCR Handbook:
>
> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts. [emphasis in the original]

The Supreme Court went on to discuss the evidence, contrasting the appellant's testimony with the documentary evidence:

> Since the ... claim that he would be physically coerced into sterilization runs contrary to the available evidence and generally known facts it is not an appropriate instance in which to apply the benefit of the doubt in order to establish the [claimant's] case.[11]

### 1.4. Notice to the Claimant

The Federal Court Trial Division has stated in *Ayimadu-Antwi*[12] that credibility is always an issue in CRDD hearings and that no special notice needs to be provided to the claimant. However, the Board

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10 *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593.

11 Ibid., at 669-671. The dissenting analysis to which the aforementioned majority reasons refer is set out, in part, below. The dissenting justices, at 627, found that the claimant's account did not run contrary to the available evidence and generally known facts; consequently, it was appropriate to apply the benefit of the doubt:

> The [claimant's] account of events so closely mirrors the known facts concerning the implementation of China's population policy that, given the absence of any negative finding as to the credibility of the [claimant] or of his evidence, I think it clear that his quite plausible account is entitled to the benefit of any doubt that may exist. With respect, I see no merit in the approach taken by some members of the court and by my colleague Major J. to seize upon sections of the [claimant's] testimony in isolation. Indeed, I find such a technique antithetical to the guidelines of the UNHCR Handbook (see paragraph 201).

12 *Ayimadu-Antwi, Yaw v. M.C.I.* (F.C.T.D., no. IMM-4821-94), Simpson, May 10, 1995. This was reiterated in *Bains, Iqbal Singh v. M.C.I.* (F.C.T.D., no. IMM-2055-94), Muldoon, August 25, 1995, at pages 11-12: "So it is that credibility is always in issue. So it is that no one should ever be deceived about credibility always being in issue." See also *Paranawithana, Tissa Rupananda v. M.C.I.* (F.C.T.D., no. IMM-670-96), Heald, November 21, 1996. But see *Abubakar v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 186 (F.C.T.D.), where the Court held the CRDD erred in not

acts at its peril when it isolates some concerns and draws those to the attention of the claimant, but actually decides the case on the basis of others, which are not identified as issues.

In *Velauthar*, the Court pointed out that, if the decision-makers have concerns about the claimant's credibility but direct the claimant's counsel to address only other areas of the claim in submissions, it would be a breach of natural justice to base a negative determination on an adverse finding of credibility, as the claimant would be denied an opportunity to know and address the case against the claimant.[13]

It is permissible for the CRDD to identify credibility as an issue should a concern arise during the course of the hearing, even where it has not been identified as an issue previously, provided that it does so in clear terms and provides the claimant with an opportunity to address the issue.[14]

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giving notice of the importance of an issue—namely the claimant's identity, "which forms the heart of its decision"—which did not seem important to counsel at the time.

In *Sivagnanam, Sitha v. M.C.I.* (F.C.T.D., no. IMM-2357-97), Pinard, April 17, 1998, the Court held that the CRDD member's comment, during the hearing, that the information "does no more than cast a shadow," did not preclude that member from forming a different opinion once he had time to fully consider the evidence. In *Mohamed, Kamil v. M.C.I.* (F.C.T.D., no. IMM-2445-96), Muldoon, August 27, 1997, the Court found that accepting the fear of persecution in the Eastern Province did not preclude the CRDD from assessing the general credibility of the claimant on the particular evidence relating to his experiences there. In *Derbas, Ahmad Issa v. S.G.C.* (F.C.T.D., no. A-1128-92), Pinard, August 18, 1993, the Court stated: "the Board did not violate the requirements of natural justice by telling the [claimant] he was credible and needed not call further evidence, and then rejecting his claim on the ground there was no objective foundation for the expressed fear."

13 *Velauthar v. Canada (Minister of Employment and Immigration)* (1992), 141 N.R. 239 (F.C.A.). See also *Perera, Nandasena v. M.E.I.* (F.C.T.D., no. IMM-4381-93), Wetston, August 10, 1994; *Mark, Pramakanthan v. M.E.I.* (F.C.T.D., no. A-1272-92), Teitelbaum, June 1, 1994; *Thiara, Ravinder Singh v. M.C.I.* (F.C.T.D., no. IMM-1353-96), MacKay, March 6, 1996; *Mandar, Kashmeer Singh v. M.C.I.* (F.C.T.D., no. IMM-4605-96), Reed, October 3, 1997 (although the panel, at the outset, indicated identity was not an issue, the RCO raised it at the end of the hearing; since the panel did not endorse that assertion, the claimant was entitled to assume it was still not an issue); *Butt, Sarmad Zahoor v. M.C.I.* (F.C.T.D., no. IMM-475-97), MacKay, March 6, 1998. In *Augustine, Sylvester Sri Rajakulendran v. M.C.I.* (F.C.T.D., no. IMM-2732-97), Teitelbaum, July 15, 1998, the Court overturned the CRDD decision, based on credibility, because counsel may have misunderstood what the panel meant when they said that they would not discuss the issue of personal identity. However, in *Jezly, Roshan Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2721-98), Cullen, June 2, 1999, the Court held that the CRDD's finding that the claimant was not in the area of the country he alleges he was in, did not mean that the panel found identity to be an issue after having indicated that it was not an issue. In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, during the hearing the CRDD represented that credibility was not in issue, but in rejecting the claim, the CRDD seriously impugned the claimant's credibility and thereby denied natural justice.

14 *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 168 (F.C.T.D.). See, however, *Mandar, Kashmeer Singh v. M.C.I.* (F.C.T.D., no. IMM-4605-96), Reed, October 3, 1997, where the panel did not confirm the RCO's submission that identity, which was ruled out as an issue at the outset, had become an issue during the course of the hearing, though it proceeded to decide the claim on that basis. In *Arandarajah, Murugathas v. M.C.I.* (F.C.T.D., no. IMM-3861-96), Rouleau, July 3, 1997, although the CRDD indicated that identity was a serious issue, the Court found no obligation on the part of the panel to ask for evidence regarding that mater.

### 1.5. Allowing Testimony, Witnesses and Examination of Documents

The claimant must be provided a reasonable opportunity to present evidence. However, the right to call further evidence is not absolute. The CRDD errs when it does not allow the claimant to adduce the testimony of a witness who is to testify by way of corroboration on the very issue on which the claimant was found not to be credible.[15]

However, although it may be preferable to adjourn in some cases, the Board does not err when it refuses to hear a witness who would not have clarified concerns about critical aspects of the claimant's story (e.g., the failure to provide certain information in the PIF or the claimant's identity) or would simply have testified about matters not in issue.[16]

Where the Board rejects a claim because it doubts that certain pivotal events (such as a sexual assault) occurred or that they were connected to the activities on which the claim is based, it should first afford the claimant an opportunity to testify as to these events.[17] The CRDD should accommodate reasonable requests by the claimant to examine documents whose authenticity is impugned by Canadian officials.[18]

### 1.6. Interlocutory Decisions on Credibility

The Federal Court has directed that the CRDD "need not render an interlocutory judgment [respecting the credibility of trustworthiness of the evidence] before rendering its decision concerning the claim to refugee status. ... this procedure is not to be recommended nor is it acceptable."[19]

### 1.7. Proper Evidentiary Basis for Findings on Credibility

An adverse finding of credibility must have a proper foundation in the evidence. If a finding of fact upon which an adverse finding of credibility is based was made without regard to the evidence, then the

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15 *Kaur v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 301 (F.C.T.D.); *Parnian, Saeid v. M.C.I.* (F.C.T.D., no. IMM-2351-94), Wetston, May 19, 1995; *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 48 (F.C.T.D.).

16 *Singh, Kewal v. M.E.I.* (F.C.T.D., no. IMM-5177-93), MacKay, September 19, 1994; *Wang, Tian Rong v. M.C.I.* (F.C.T.D., no. IMM-534-98), Wetston, December 17, 1998; *Katambala, Adric v. M.C.I.* (F.C.T.D., no. IMM-5827-98), Reed, July 19, 1999.

17 *Joseph, Chandani v. M.E.I.* (F.C.T.D., no. IMM-2623-93), Cullen, March 9, 1994; *Mayeke, Yai Florence Futila v. M.C.I.* (F.C.T.D., no. IMM-2496-98), Tremblay-Lamer, May 5, 1999. See, however, *Villalobos v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 153 (F.C.T.D.), where the Court held that there was no duty on the CRDD to call a witness who could have supported the claim.

18 *Mayela, Dave Nzongo v. M.C.I.* (F.C.T.D., no. IMM-3776-98), Lutfy, June 18, 1999.

19 *Rahmatizadeh, Ali v. M.E.I.* (F.C.T.D., no. IMM-2696-93), Nadon, April 6, 1994. See also *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 209 (F.C.T.D.), where the Court stated that "there is no obligation on the panel to signal its conclusions on implausibility or on the general credibility of evidence, in advance of a decision. Rather, the onus remains on the [claimant] to establish by credible evidence his claim to be considered a Convention refugee."

adverse finding of credibility will be overturned.[20] Consequently, a finding of lack of credibility based on a misunderstanding or ignoring of the evidence, or for which there is no basis in the evidence to support an inference arrived at by the tribunal, will not be allowed to stand.

The Federal Court will not, however, interfere with the decision of the Board if the Board had before it evidence that, taken as a whole, would support its negative assessment of credibility, if its findings were reasonable in light of the evidence and if reasonable inferences were drawn from that evidence.[21] When a decision is made on an assessment of credibility, it is not the role of the Court to substitute its decision for that of the Board even if the Court might not have reached the same conclusion.[22]

### 1.8. Assessing a Witness's Testimony

A decision-maker customarily takes into account the integrity and intelligence of the witness and the overall accuracy of the statements being made. The witness's powers of observation and capacity for remembering are important factors. An assessment is customarily made of whether the witness is honestly endeavouring to tell the truth, that is, whether the witness appears frank and sincere or biased, reticent and evasive. Factors considered by the courts[23] in assessing credibility include the witness's

- desire to be truthful
- other motives
- general integrity

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20 Among many Federal Court decisions, see especially *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.); *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Abubakar v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 186 (F.C.T.D.).

21 *Larue, Jacqueline Anne v. M.E.I.* (F.C.T.D., no. 92-A-6666), Noël, May 13, 1993.

22 In *Sommariva v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 25 (F.C.T.D.), at 27, Mr. Justice Jerome stated: "When ... a tribunal's impugned finding relates to the credibility of a witness, the Court will be reluctant to interfere with that finding, given the tribunal's opportunity and ability to assess the witness, her demeanour, frankness, readiness to answer, coherence and consistency, in oral testimony before it." See also *Abdurahaman v. Canada (Minister of Employment and Immigration)* (1983), 50 N.R. 315 (F.C.A.); *Singh, Jasvir v. M.E.I.* (F.C.A., no. A-1272-82), Mahoney, Hugessen, Stone, May 3, 1984; *Brar, Iqbaljit Singh v. M.E.I.* (F.C.A., no. A-987-84), Thurlow, Hugessen, Cowan, May 29, 1986; *Mansour, Sleiman v. M.E.I.* (F.C.A., no. A-654-90), Marceau, Desjardins, Décary, December 5, 1991; *Samad, Fani Abdi v. M.E.I.* (F.C.A., no. A-735-90), Heald, MacGuigan, Linden, February 10, 1992; *Varnousefaderani, Hamid Reza v. M.E.I.* (F.C.A., no. A-386-90), Hugessen, Desjardins, Henry, May 26, 1992; *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993; *Oduro, Prince* v. *M.E.I.* (F.C.T.D., no. 92-A-7171), Noël, June 2, 1993; *Muhammed, Jamal v. M.E.I.* (F.C.T.D., no. A-714-92), MacKay, August 12, 1993.

23 Courts have developed a hierarchy of preferences concerning various types of witnesses. As between involved witnesses or "actors" and mere bystanders, the former are preferred. There is however, no authority requiring preference to be given to the testimony of "actors" over that of expert witnesses. While the testimony of involved, but disinterested, witnesses is preferred (at least in the absence of extenuating circumstances), over that of interested witnesses, whether involved or not, a court will not disbelieve testimony solely because a witness is interested and without reference to the facts and other relevant factors. See *J.P. Porter Co. Ltd. v. Bell et al.*, [1955] 1 D.L.R. 62 (N.S.S.C.); *Lefeunteum v. Beaudoin* (1898), 28 S.C.R. 89; *Bateman v. County of Middlesex* (1912), 6 D.L.R. 533 (Ont.C.A.); *Re Direct Exeter* (1850), 3 DeG&Sm 214.

- general intelligence
- relationship or friendship to other parties
- opportunity for exact observation
- capacity to observe accurately
- firmness of memory to carry in the mind the facts as observed
- ability to resist the influence, frequently unconscious, to modify recollection
- capacity to express what is clearly in the mind
- ability to reproduce in the witness-box the facts observed
- demeanour while testifying

## 2. SPECIFIC CONCERNS

From a review of the Federal Court jurisprudence, it is possible to identify six areas which have caused particular difficulty for Members when assessing the credibility of claimants or other witnesses.

### 2.1. CONSIDERING ALL OF THE EVIDENCE

#### 2.1.1. Considering the Evidence in its Entirety

The Federal Court has made it clear in a number of cases that when assessing the credibility of the claimant or other witness, it is important to remember that *all* of the evidence, both oral and documentary, must be considered and assessed, not just selected portions of the evidence.[24] Furthermore, when assessing all of the evidence, it must be assessed *together*, not parts of it in isolation from the rest of the evidence. The Federal Court has also emphasized that it is important not just to concentrate on exaggerations.[25]

This means that the panel must do more than simply search through the evidence looking for inconsistencies or for evidence that lacks credibility, thereby "building a case" against the claimant's credibility.

The Court of Appeal has pointed out that, in assessing the evidence, the Board's reasons must clearly indicate that it has considered all of the relevant evidence, however feeble, in coming to its conclusion.[26] This does not mean, however, that every piece of evidence needs to be referred to and

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24 *Owusu, Kweku v. M.E.I.* (F.C.A., no. A-1146-87), Heald, Hugessen, Desjardins, January 31, 1989; *Mensah, George Akoi.ene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.). This would include a consideration of the conditions and laws in the claimant's country or origin, as well as the experiences of similarly situated persons. See, respectively, *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.); and *Chaudri v. Canada (Minister of Employment and Immigration)* (1986), 69 N.R. 114 (F.C.A.).

25 *Yaliniz v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm. L.R. (2d) 163 (F.C.A.); *Mahathamasseelan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 29 (F.C.A.). In *Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992, the Court held that the panel will have erred if it allows itself to become so fixated on the details of the claimant's testimony that it forgets the substance of the facts on which the claim is based. In *Quinteros, Carolina Elizabeth Lovato v. M.C.I.* (F.C.T.D., no. IMM-4030-97), Campbell, September 22, 1998, the Court held that the CRDD's statement that the claimant "fails to demonstrate a sincere desire to tell the truth," simply because she had allegedly manufactured a completely false account of her circumstances to the visa officer, "discloses a negative view held by the decision maker towards the [claimant] which made it impossible for the applicant to have a fair hearing of her refugee claim."

26 *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 310 (F.C.A.). In *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.), the Court stated that the fact that not all of the documentary evidence was mentioned in the Board's reasons was not fatal to its decision, where the CRDD has considered and weighed the totality of the evidence. In *Gourenko, Rouslan v. S.G.C.* (F.C.T.D., no. IMM-7260-93), Simpson, May 4, 1995, the Court stated at page 2:

discussed in the reasons. The Board is presumed to have weighed and considered all the evidence presented to it, unless the contrary is shown.[27] In *Cepeda-Gutierrez,*[28] however, the Court cautioned that

> the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact.

Generally speaking, it is only necessary to refer explicitly to evidence that is directly relevant to the issue being addressed, and that which otherwise may appear to be in conflict with the conclusion reached.[29]

(See also *Weighing Evidence,* IRB Legal Services, December 15, 1997 – 6.8. Documentary Evidence.)

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> As a starting point in my analysis, I should note that the Board cannot comment on all documents in its record, and the fact that no mention is made of a document does not necessarily mean that the document has been ignored. It is reasonable to presume that the Board will consider all important documents.

27 *Florea, Constantin v. M.E.I.* (F.C.A., no. A-1307-91), Hugessen, Desjardins, Décary, June 11, 1993.

28 *Cepeda-Gutierrez, Carlos Arturo v. M.C.I.* (F.C.T.D., no. IMM-596-98), Evans, October 16, 1998. The inclusion of the "boilerplate" assertion that the Board considered all the evidence before it may not be sufficient to prevent this inference from being drawn. As for the question, "when is a document so important that it must be specifically mentioned in the [reasons for the] decision," in *Gourenko, Rouslan v. S.G.C.* (F.C.T.D., no. IMM-7260-93), Simpson, May 4, 1995, the Court stated at pages 3-4:

> In my view, a document need only be mentioned in a decision if, first of all, the document is timely, in the sense that it bears on the relevant time period. Secondly, it must be prepared by a reputable, independent author who is in a position to be the most reliable source of information. Thirdly, it seems to me that the topic addressed in the document must be directly relevant to [a claimant's] claim. For example, documents sent to or received by [a claimant], or prepared for [a claimant], or about [a claimant], which bear on relevant issues would, in the ordinary course be mentioned in reasons. In addition, if a document is directly relevant to the facts alleged by [a claimant], one would expect to see that document addressed in the Board's reasons. On the other hand, numerous other documents may be only marginally relevant. In my view, it is not a reviewable error for the Board to fail to deal with such documents in its reasons.

29 Failure to refer to relevant evidence which is specific to the claim and corroborates the claimant's evidence may lead to the inference that the Board made its decision without regard to the evidence before it. See *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296; *Iordanov, Deian Iordanov v. M.C.I.* (F.C.T.D., no. IMM-1429-97), Muldoon, March 18, 1998. In *Atwal v. Canada (Secretary of State)* (1994), 25 Imm. L.R. (2d) 80 (F.C.T.D.), the CRDD was found to have erred in not referring to a case-specific document that was directly relevant to the central issue addressed in the reasons for decision. In *Khan, Mohammed Azad v. M.C.I.* (F.C.T.D., no. IMM-2831-98), Teitelbaum, March 11, 1999, the CRDD failed to refer in its reasons to documents submitted to corroborate the claimant's involvement in politics; since the claimant was found not to be credible, the CRDD erred by not referring to documents which were important to the central issue before the it.

With respect to medical or psychiatric reports, see 2.4.10. Medical Reports.

*Frimpong* and other cases illustrate the related point that reasons must be given for disregarding uncontradicted statements, either expressly or implicitly. If this is not done, it will leave the decision open to attack.[30]

### 2.1.2. Assessing the Balance of the Evidence Found to be Credible

Even if there are inconsistencies or exaggerations, the panel must still go on to assess the evidence which is found to be credible and to determine the claim as the totality of the evidence warrants. In other words, the rejection of some of the evidence, or even all of the claimant's testimony, on account of lack of credibility does not necessarily lead to the rejection of the claim: the claim must still be assessed on the basis of the information which was found to be true,[31] including documentary evidence relevant to the claimant's situation and evidence regarding persons similarly situated. Where there is relevant evidence that does not emanate from the claimant's testimony and can link the claimant to the persecution, the Board may have to consider it.[32]

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30 *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 183 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 310 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.).

31 In *Tharmalingam, Kugathasalingam v. M.E.I.* (F.C.T.D., no. IMM-3318-93), Denault, August 23, 1994, the Court held that, since the CRDD did not make a general finding of lack of credibility, it was obligated to consider the remaining credible evidence. In *Chong, Lim Man v. M.C.I.* (F.C.T.D., no. IMM-3438-97), Rothstein, July 7, 1998, the Court held that the panel seemed to have rejected the claim solely on the grounds that it did not believe the embellishments that it thought the claimant had made up, without addressing the primary issue before it (the claimant's religious affiliation). In *Husein, Anab Ali v. M.C.I.* (F.C.T.D., no. IMM-2044-97), Joyal, May 27, 1998, however, the Court held that once the Board had concluded that identity had not been established, it was not necessary to analyze the evidence any further; the main claimant's failure to prove that she belonged to a persecuted clan effectively undermined any claim of a well-founded fear of persecution.

In *Kabulo v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 207 (F.C.T.D.), the Court held that it was not an error for the CRDD not to consider the wife's cursory testimony, where the testimony of the husband, the principal claimant, was not believed. See also *Gutierrez, Neptali v. M.C.I.* (F.C.T.D., no. IMM-4741-97), Rothstein, August 27, 1998, for a similar conclusion. However, in *Khan, Himmotur Rahman v. M.C.I.* (F.C.T.D., no. IMM-3428-97), Denault, August 21, 1998, the Court found that the CRDD erred by rejecting the claim of the husband in a summary way on the basis that the principal claimant was not credible, when he had his own allegations of persecution.

32 *Djama, Idris Mohamed v. M.E.I.* (F.C.A., no. A-738-90), Marceau, MacGuigan, Décary, June 5, 1992. In *Burgos-Rojas, Juan Pedro v. M.C.I.* (F.C.T.D., no. IMM-3159-98), Rouleau, January 25, 1999, the CRDD found the claimant not to be credible and rejected the account of what happened to him; however, the Court overturned the decision because the CRDD failed to consider the question of whether he had a well-founded fear of persecution as a result of his sexual orientation. In *Seevaratnam, Sukunamari v. M.C.I.* (F.C.T.D., no. IMM-3728-98), Tremblay-Lamer, May 11, 1999, even if much of the evidence were disbelieved, there was evidence linking her claim to the ongoing persecution of young Tamil women in Sri Lanka. In *Thiyagarajah, Thushyanthan v. M.C.I.* (F.C.T.D., no. IMM-2480-98), McKeown, June 24, 1999, on the other hand, the Court held that the CRDD was not required to review the documentary evidence with respect to a general fear of persecution as a general member of a group in a country (young Tamil males from the north of Sri Lanka) when the CRDD has made a general finding of credibility against a claimant and the claimant has not raised his fear in terms of a general group. In *Nasreen, Rehana v. M.C.I.* (F.C.T.D., no. IMM-6048-98), Cullen, September 8, 1999, the Court held that, in light of the total loss of the claimant's credibility, it was not necessary for the panel to address the general

### 2.1.3. General Finding of Lack of Credibility

It is possible to make a finding that overall a claimant's testimony is not credible. In some cases, for instance, the claimant's contradictory testimony can cast doubt upon the totality of his *viva voce* evidence.[33]

The Court of Appeal has stated in *Sheikh*:[34]

> even without disbelieving every word [a claimant] has uttered, a ... panel may reasonably find him so lacking in credibility that it concludes there is no credible evidence relevant to his claim ... In other words, a general finding of a lack of credibility on the part of the [claimant] may conceivably extend to all relevant evidence emanating from his testimony.

However, where a finding of a total lack of credibility cannot be made, the remaining credible or trustworthy evidence must be considered to determine whether it supports a finding of a well-founded fear of persecution. (See the discussion in 2.1.2. Assessing the Balance of the Evidence Found to be Credible.)

### 2.1.4. Lack of Subjective Fear

It may be possible to make a negative finding on credibility when all of the testimony which is intended to establish the subjective element of fear is not credible, even if there is no doubt as to the objective element.[35] However, the Federal Court has also stated that it is difficult to see in what circumstances it could be said that a person could be right in fearing persecution and still be rejected because it is considered that fear does not actually exist in the person's conscience.[36]

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situation for Shia Muslims in Pakistan; there was no real foundation left to make her case out on the second issue.

33 In *Dan-Ash v. Canada (Minister of Emplyment and Immigration)* (1988), 93 N.R. 33 (F.C.A.), at 35, Mr. Justice Hugessen stated: "unless one is prepared to postulate (and accept) unlimited credulity on the part of the Board, there must come a point at which a witness's contradictions will move even the most generous trier of fact to reject his evidence."

34 *Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.), at 244, per MacGuigan, J.A.

35 *Amaniampong, Kofi* v. *M.E.I.* (F.C.A., no. A-1326-87), Heald (dissenting), Hugessen, Mahoney, May 19, 1989. But see, however, *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.), at 246: "The double question put to the Board was whether the [claimant] had a genuine fear to return to his country and whether that fear was reasonable, i.e. founded on good grounds. In answering that question, the Board has to assess *all* the evidence put before it."

36 *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.). See also *Shanmugarajah, Appiah v. M.E.I.* (F.C.A., no. A-609-91), Stone, MacGuigan, Henry, June 22, 1992.

## 2.2. MAKING CLEAR FINDINGS ON CREDIBILITY AND PROVIDING ADEQUATE REASONS FOR SUCH FINDINGS

### 2.2.1. Clear Findings on Credibility

The Federal Court has frequently had occasion to remind the Refugee Division that if a claim is rejected essentially because of a lack of credibility, clear reasons must be given. Those aspects of the testimony which appear not to be credible must be clearly identified and the reasons for such conclusions must be clearly articulated.[37]

The Court of Appeal has stated in *Addo* that, where the Board makes no clear adverse finding of credibility, a recitation in the reasons of the claimant's testimony will be deemed to be the Board's findings of the relevant facts.[38]

### 2.2.2. Adequacy of Reasons

The Board must therefore make clear findings as to what evidence is believed or disbelieved,[39] and go on to assess any evidence found to be credible in relation to the Convention refugee definition.[40] Ambiguous comments that do not amount to an outright rejection of the claimant's evidence, but only "cast a nebulous cloud over its reliability", are not sufficient to discount the evidence.[41]

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37 In *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.), Mr. Justice Heald stated at 157-158: "the Board owed a duty ... to give the reasons for rejecting the ... refugee claim on the ground of credibility, in clear and unmistakable terms." See also *Ababio v. Canada (Minister of Employment and Immigration)* (1988), 5 Imm. L.R. (2d) 174 (F.C.A.); *Sebaratnam v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 264 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.); *Ponniah v. Canada (Minister of Employment and Immigration)* (1991), 13 Imm. L.R. (2d) 241 (F.C.A.); *Rahman v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 170 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Pour, Akbar Behzadi v. M.E.I.* (F.C.A., no. A-655-90), Marceau, Desjardins, Décary, December 5, 1991; *Bains v. Canada (Minister of Employment and Immigration* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.); *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.).

38 *Addo, Samuel v. M.E.I.* (F.C.A., no. A-614-89), Mahoney, Hugessen, Gray, May 7, 1992. However, in *Efremov, Serguei Volodimirovich v. M.C.I.* (F.C.T.D., no. IMM-834-94), Reed, February 2, 1995, the Court pointed out, at page 4, that "[t]he fact that the Board accepted the claimant's PIF into evidence, as though the written material therein had been given orally before the Board, does not mean that the Board accepted that evidence as truthful or credible. No such conclusion should be drawn from the acceptance of evidence as part of the record. The weight and credibility to be given to that evidence are still matters to be assessed by the Board."

39 *Rahman v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 170 (F.C.A.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.).

40 *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Hugessen, Pratte, Desjardins, November 23, 1989; *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), May 6, 1992, Marceau, Desjardins, Décary, May 6, 1992.

41 *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.), at 200, per Heald J.A.

Absent a conclusion impeaching the credibility of the claimant as a whole, the Board cannot, by reference to a finding expressly limited to one incident or aspect of the claimant's story, ignore other incidents or aspects of the claim.[42]

As noted by the Court of Appeal in *Hilo*, the Board should be consistent in the treatment of various aspects of the claimant's testimony. For example, the panel should not use evidence which was disbelieved as a premise (factual finding) to undermine other aspects of the claimant's testimony.[43]

The Court has called some panel's reasons regarding credibility "regrettably sparse" or even "vague" and stated that the Board owes a duty to the claimant to give its reasons for rejecting the claim on the basis of credibility in "clear and unmistakable terms."[44] If the Board believes only part of the claimant's story it is obliged to say how much was accepted and how much was rejected.[45]

The grounds for rejecting or disbelieving evidence must be stated clearly. This generally includes an obligation to give examples or illustrations of the basis for not accepting the claimant's testimony.[46] It is not enough to say that the evidence is not believed,[47] otherwise there will be an appearance of arbitrariness.

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42 *Ariff, Mohamed Faiz Mohamed v. M.C.I.* (F.C.T.D., no. IMM-1142-96), Noël, January 15, 1997.

43 *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.).

44 *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.), at 157-158, per Heald J.A.

45 *Ramirez, Ana Gabriela Espriella v. M.C.I.* (F.C.T.D., no. IMM-2540-98), McKeown, April 20, 1999.

46 *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.); *Hilo v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 199 (F.C.A.); *Gonzalez, Everth Francisco Fletes v. M.E.I.* (F.C.T.D., no. 92-T-1229), Simpson, November 18, 1993; *Yukselir, Bektas v. M.C.I.* (F.C.T.D., no. IMM-1306-97), Gibson, February 11, 1998. In *Castro, Alejandro Enrique v. M.E.I.* (F.C.T.D., no. T-2349-92), McKeown, August 5, 1993, however, the Court pointed out that the panel is not required to list each and every inconsistency provided specific examples are given. In *Isse, Kadija Ahmed v. M.C.I.* (F.C.T.D., no. IMM-2991-97), MacKay, July 7, 1998, where the CRDD's reasons were found to be deficient, the only specific examples of inconsistencies set out were in comparing the evidence of the claimant with that of her children, to which latter evidence the panel stated it gave no weight.

47 *Guzman, Luis Martinez v. M.C.I.* (F.C.T.D., no. IMM-472-97), Nadon, December 22, 1997. The case of *Zakaria, Mirza v. M.C.I.* (F.C.T.D., no. IMM-3363-98), Pinard, August 13, 1999, suggests that the duty to state in clear and unmistakable terms why it disblieves the claimant, does not apply when the claimant's evidence is inherently implausible ("is not inherently suspect or improbable"). On the other hand, in *Diaz, Juan Rodrigo Penailillo v. M.C.I.* (F.C.T.D., no. IMM-4586-98), Pinard, August 12, 1999, the Court held that a conclusion of implausibility must be supported by reference to specific and relevant elements of the evidence, and cannot merely be a summary of the testimony of the claimant.

## 2.3. BASING A DECISION ON SIGNIFICANT AND RELEVANT EVIDENCE AND ASPECTS OF THE CLAIM

### 2.3.1. Relevancy Considerations

The Federal Court has held that a finding that testimony is not credible must be based on relevant considerations.[48] It is possible, however, to use evidence that is not directly relevant to a ground for claiming refugee status in deciding that the claimant lacks credibility, where that evidence undermines the claimant's identity[49] or reveals a pattern of fabrication that gives rise to doubts generally about the claimant's veracity.[50]

### 2.3.2. Contradictions, Discrepancies and Omissions[51]

The existence of contradictions or discrepancies in the evidence of a claimant or witness is a well-accepted basis for a finding of lack of credibility.[52] This also applies to omissions in the claimant's previous statements, whether made to Canadian immigration officials (e.g., port of entry notes),[53] in a

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48 *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm. L.R. (2d) 58 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989.

49 For example, in *Muhammed, Jamal v. M.E.I.* (F.C.T.D., no. A-712-92), MacKay, August 12, 1993, the Court upheld the CRDD's conclusion disbelieving that the claimant was a native of Sudan, based on his lack of knowledge of basic information about his country (flag, national holiday, population of his city). See also *Katambala, Adric v. M.C.I.* (F.C.T.D., no. IMM-5827-98), Reed, July 19, 1999.

50 *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.).

51 The definitions that follow are from *The Concise Oxford Dictionary* and are "working" definitions. Other broader or narrower interpretations are possible, but these are put here as a guide.

- *Contradictory* is used to refer to "facts", propositions or ideas that are mutually opposed or inconsistent so that one and only one of them must be true.
- *Inconsistent* means not in keeping, discordant or incompatible.
- *Implausible* is the opposite of plausible which means seeming reasonable or probable.

52 *Dan-Ash v. Canada (Minister of Employment and Immigration)* (1988), 93 N.R. 33 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.). In *Epane, Florent v. M.C.I.* (F.C.T.D., no. IMM-974-98), Rouleau, June 17, 1999, the CRDD erred by not taking into account the fact that the claimant, who was nervous during the hearing, corrected her error (as to the date of the elections) on her own initiative.

53 In *Dehghani v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 587 (C.A.), the Federal Court held, in relation to the now defunct first level ("credible basis") hearing, the tribunal could refer to inconsistencies (e.g., omissions) between prior statements made by the claimant, without counsel, at a port of entry examination, and the claimant's later affidavit evidence and testimony at the hearing to make an adverse finding of credibility. This decision was upheld by the Supreme Court of Canada, reported in [1993] 1 S.C.R. 1053, which ruled that routine inquiries at secondary examination on the issues of identity, admissibility and a refugee claim do not amount to detention and thus the right to counsel is not invoked. But see, however, *Sow, Mamadou Yaya v. M.C.I.* (F.C.T.D., no. IMM-1662-98), Tremblay-Lamer, March 8, 1999, where the claimant was detained after reporting to claim refugee status and questioned by immigration officers without being advised of his right to counsel. Although the CRDD accepted the notes into evidence, it gave no weight to them. The Court held that the panel exercised due diligence in refusing to take the notes into account, given the questionable way in which they had been obtained. Moreover, the panel was not obliged to recuse itself because it had read the notes.

previous examination (e.g., examination under oath)[54] or hearing[55] on the claim, or in the claimant's Personal Information Form (PIF)[56] or the PIFs of family members.[57] It appears, however, that little can be made of the claimant's failure to advise Canadian officials abroad of his or her fear of persecution[58] or with respect to omission of information in the eligibility interview notes.[59]

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54 *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.); *Kassa v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 1 (F.C.A.); *Boakye, Comfort Duodo v. M.E.I.* (F.C.A., no. A-562-91), Mahoney, Robertson, Gray, January 26, 1993; *Guevara, Melida de Jesus Valle v. M.E.I.* (F.C.T.D., no. A-58-93), Nadon, December 17, 1993.

55 *Rahnema v. Canada (Solicitor General)* (1993), 22 Imm. L.R. (2d) 127 (F.C.T.D.) (transcript of previously aborted CRDD hearing); *Addai, Akua v. M.E.I.* (F.C.T.D., no. IMM-761-93), McGillis, February 16, 1994 (transcript of credible basis hearing); *Sitsabeshan v. Canada (Secretary of State)* (1994), 27 Imm. L.R. (2d) 294 (F.C.T.D.) (transcript of overturned CRDD hearing at subsequent *de novo* hearing ordered by Federal Court); *Diamanama, Nsimba v. M.C.I.* (F.C.T.D., no. IMM-1808-95), Reed, January 30, 1996 (transcript of overturned CRDD hearing); *Agranovski, Vladislav v. M.C.I.* (F.C.T.D., no. IMM-243-97), Pinard, November 25, 1997 (transcript of overturned CRDD hearing filed with claimant's express consent; the panel questioned the claimant about each plausibility noted in its second decision).

56 *Bakare, Abeni v. M.E.I.* (F.C.T.D., no. IMM-1603-93), Reed, January 19, 1994; *He, Feng Kui v. M.E.I.* (F.C.A., no. A-1194-91), Heald, Desjardins, Linden, July 20, 1994 (failure to mention meaningful events). In *Grinevich, Vladimir v. M.C.I.* (F.C.T.D., no. IMM-1773-96), Pinard, April 11, 1997, the Court stated: "Where a refugee claimant fails to mention important facts in his or her PIF, this may legitimately be considered by the Board to be an omission that goes to lack of credibility."

57 *Gandour, Fatema Hoteit v. M.E.I.* (F.C.T.D., no. A-1426-92), Dubé, October 18, 1993; *Kaur, Jaswinder v. M.C.I.* (F.C.T.D., no. IMM-1944-96), Jerome, July 24, 1997. Some of the pitfalls of using PIFs of related claimants have been highlighted in the following cases: In *Wimalachandran, Nadarajah v. M.C.I.* (F.C.T.D., no. IMM-2321-95), Reed, April 1, 1996, the Court faulted the Refugee Division for drawing adverse findings from omissions in the claimant's PIF without taking up counsel's offer to produce the original Tamil version of the PIF which, it was contended, had gone through an editing process. In *Chellaiyah, Arulthas v. M.C.I.* (IMM-3308-98), Lutfy, July 19, 1999, the Court held that the CRDD could not assume that the information in the claimant's sister's PIF was correct, nor did the claimant bear the burden of explaining the alleged discrepancies; that could only be properly done upon an assessment of the sister's credibility and the circumstances surrounding the disclosure of information at the time her PIF was prepared. In *Bayrami, Javad Jamali v. M.C.I.* (F.C.T.D., no. IMM-3904), McKeown, July 22, 1999, the Court faulted the CRDD for not ruling on the appropriatness of entering the PIF of one daughter where the second daughter's PIF was unavailable. In *Bebondas, Frankline Hohn v. M.C.I.* (F.C.T.D., no. IMM-428-99), Campbell, October 20, 1999, the Court faulted the CRDD for concluding that the claimant fabricated his answer to question 37 of his PIF, primarily because portions of his PIF were the same as the PIFs of three other claimants, in view of the claimant's explanation that it was his counsel who drew up his PIF (thus the claimant could not properly be made to account for it).

58 In *Fajardo v. Canada (Minister of Employment and Immigration)* (1994), 21 Imm. L.R. (2d) 113 (F.C.A.), the Court commented that only the most naive applicant for a visitor's visa would indicate to the visa officer that her purpose for going to Canada was not to visit but to seek asylum. See also *Quinteros, Carolina Elizabeth Lovato v. M.C.I.* (F.C.T.D., no. IMM-4030-97), Campbell, September 22, 1998.

59 In *Asfaw, Sebsibe Haile v. M.C.I.* (F.C.T.D., no. IMM-2786-98), Sharlow, March 25, 1999, the Court noted the limited function of the eligibility interview and that, in any event, the claimant was not told that the information provided would be considered by the CRDD. The Court held that the CRDD erred in not giving notice to the claimant that his explanation for not mentioning important information during the interview was not satidfactory.

### 2.3.4. PIFs and Statements Made to Immigration Officials

Port of entry notes or documents prepared by Canadian immigration officials are admissible at a CRDD hearing, without any further participation by the Minister at the hearing,[60] even though they may be unsigned and undated[61] and even though their author is not called to testify.[62]

In a number of cases, the Federal Court has pointed out some of the pitfalls in relying excessively on contradictions or omissions in port of entry notes[63] and PIFs[64] as a reason for a finding of lack

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60 *Parnian, Saeid v. M.C.I.* (F.C.T.D., no. IMM-2351-94), Wetston, May 19, 1995. According to *Rahman, Saidur v. M.E.I.* (F.C.T.D., no. IMM-2078), Denault, June 10, 1994, the admission of such documents does not contravene the *Privacy Act* as they were used for a use consistent with the purpose for which the information was obtained. According to *Johnpillai, Christian Joy Rajkumar v. S.S.C.* (F.C.T.D., no. IMM-3651-94), Reed, January 31, 1995, it is not a breach of natural justice for a decision-maker to be provided with such documents, even if they contain prejudicial information, prior to the hearing, as long as the claimant has an adequate opportunity to respond. All that is required is timely disclosure that is meaningful for the claimant in the circumstances. See *Gandour, Fatema Hoteit v. M.E.I.* (F.C.T.D., no. A-1426-92), Dubé, October 18, 1993, where the Court held that the port of entry notes should not have been admitted without timely advance disclosure. Disclosure effected only during the course of cross-examination may not be sufficient, and this deficiency may not always be curable by offering an adjournment. See *Tetteh-Louis, Seth v. S.S.C.* (F.C.T.D., no. IMM-4218-93), Pinard, July 8, 1994. (See also *Instructions for the Acquisition and Disclosure of Information for Proceedings in the Refugee Division*, CRDD Instructions: 96-01.)

61 *M.E.I. v. Boampong, Sheik Jedges* (F.C.A., no. A-1219-91), Isaac, Marceau, McDonald, August 6, 1993. Once admitted, however, it is up to the tribunal to assess the probative value of the port of entry notes, i.e., their weight and reliability. See *Karikari v. Canada (Minister of Employment and Immigration)* (1994), 169 N.R. 131 (F.C.A.).

62 *Mongu, E-Beele v. S.G.C.* (F.C.T.D., no. IMM-5060-93), Richard, October 12, 1994; *Abdoli, Siamak v. M.C.I.* (F.C.T.D., no. IMM-3769-94), Muldoon, March 13, 1995. The claimant, however, has the option of subpoenaing the author of the document, if he or she so chooses, and is responsible for so doing if the CRDD does not call the officer as a witness. See *Lin, Guo Qing v. M.C.I.* (F.C.T.D., no. IMM-4864-94), Gibson, September 28, 1995. The case of *Cheung v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 764 (C.A.) suggests that the right "to cross examine" the deponent of an affidavit can be denied only where there are proper grounds to do so. As pointed out in *Dipchand, Neeranjan v. M.E.I.* (F.C.A., no. A-619-91), Mahoney, MacGuigan, Holland, February 10, 1993, there is a duty on the part of the decision-makers, in the exercise of their discretion to issue a subpoena, to consider all the relevant factors including the likelihood of the potential witness giving material evidence. In *Kusi v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm. L.R. (2d) 281 (F.C.T.D.), the Court ruled that it was a breach of natural justice and fundamental justice not to call for cross-examination the immigration officer who authored notes of a port of entry examination where the claimant contested the accuracy of those notes. In *Nadarajah, Kumaramoorthy v. M.C.I.* (F.C.T.D., no. IMM-4123-98), Blais, June 15, 1999, where the immigration officer's hand-written notes could not be located, the Court held that the CRDD was justified in denying a request to reopen the hearing for cross-examination of all immigration officers who had handled the file.

63 In *Singh, Amrik v. M.C.I.* (F.C.T.D., no. IMM-2835-95), Campbell, July 16, 1996, the Court cautioned that it is "poor practice" for the Board to find the notes to be accurate on "pure faith". The Board should inquire into such matters as the context of the interview and the degree to which the person understood the questions being put. In *Kanapathipillai, Bagawathy v. M.C.I.* (F.C.T.D., no. IMM-5186-97), Campbell, July 31, 1998, the Court found that the 68-year-old female claimant, speaking through an interpreter after arriving in a strange country, and being asked to account before an authority figure, had

offered a reasonable explanation for not telling a full story during the twenty-minute interview at the port of entry, namely, she only answered the questions asked of her. The Court held that for the CRDD to say, without reasons, that the claimant's explanation is "not satisfactory", is capricious. In *Thambirasa, Sakuntala v. M.C.I.* (F.C.T.D., no. IMM-1224-98), Reed, February 3, 1999, the Court found that: (1) The panel had failed to consider the reasons a (Tamil) woman would be reluctant to disclose a sexual assault to a stranger, a male, who speaks a different language and is in a country with a culture different from her own; (2) the port of entry notes completely fill the space provided for them; (3) what is written the is chosen by the officer, not the claimant; (4) there is no expectation that the brief few lines of notes are meant to tell the whole story.

64 In *Boshnakov, Valeri v. M.C.I.* (F.C.T.D., no. A-418-91), Pratte, Hugessen, Desjardins, November 23, 1993, the Court held that where the CRDD states at the hearing that it accepts the facts in the revised PIF as true, it cannot, in its reasons, reject that evidence because of discrepancies between the original and revised PIFs. In *Osman, Abdirizak Said v. M.E.I.* (F.C.T.D., no. IMM-261-93), Nadon, December 22, 1993, the Court cautioned the CRDD not to discount the claimant's testimony in its entirety by simply carrying out a comparison of two different PIFs submitted by the claimant which contain discrepancies; the Board should go on to determine whether the claimant has any credible evidence to offer, especially where there is independent corroboration of part of the claimant's story. In *Taleb, Ali v. M.C.I.* (F.C.T.D., no. IMM-1449-98), Tremblay-Lamer, May 18, 1999, the Court held that the CRDD was entitled to find the claimant's first PIF as more credible than the revised one, especially since the former was corroborated by the documentary evidence.

In *Anthonipillai, Jeyaratnam v. M.C.I.* (F.C.T.D., no. IMM-1709-95), Simpson, March 5, 1996, the Court held that the CRDD could accept at a second CRDD hearing, the PIF from the first hearing (the decision therein had been quashed on judicial review), which differed in some respects from the second PIF tendered by the claimant at the rehearing of the claim; the preferred procedure in such a case is for the first PIF to be entered as a CRDD exhibit (if tendered by the Board). See also *Aquino, Jose Felix Paniagua v. M.E.I.* (F.C.A., no. A-344-89), Mahoney, MacGuigan, Linden, June 4, 1992, where the Court held that in order for the Board to rely on inconsistencies between the PIF and the claimant's oral testimony, the PIF must be entered in evidence at the hearing. Note, however, that this case was distinguished in *Barrera, Mario Moises Guzman v. M.E.I.* (F.C.T.D., no. A-1552-92), McGillis, November 10, 1993, where the Court held that the fact the PIF was not filed as an exhibit was only a matter of form, and this did not preclude the CRDD from referring to the document. In *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993, the Court commented adversely on the fact that there was no evidence that the (revised) PIF had been translated to the claimant.

In *Castroman v. Canada (Secretary of State)* (1994), 27 Imm. L.R. (2d) 129 (F.C.T.D.), the Court stated at page 131-132: "One of the primary ways that the board tests a claimant's credibility is by comparing the PIF with the claimant's oral testimony. It is intended that all questions concerning the PIF, directed to the claimant, should be answered fully. In my view, it is not proper for a lawyer to interfere with the RHO's or a member's questioning of the claimant with respect to his or her PIF. The lawyer cannot attempt to shield the client from questioning as to why certain matters were omitted from the PIF, on the basis of solicitor-client privilege. If the lawyer seeks to do this, then the Board would be entitled to give very little weight to the client's credibility." In *Bitumba, Bikoka v. M.E.I.* (F.C.T.D., no. IMM-1023-93), Noël, February 25, 1994, the Court held that the panel had raised a reasonable apprehension of bias by calling for production of (privileged) notes the claimant gave to his counsel for the purpose of preparing the PIF, and indicating that in the absence of same it would draw an adverse inference (claimant alleged that matters omitted from his PIF had been set forth in the notes). However, in *Molina, Hector Hugo Quiroz v. M.E.I.* (F.C.T.D., no. IMM-577-93), Nadon, June 10, 1994, the Court held that it was not an error for the panel to examine the claimant's file where counsel consented to same.

of credibility. Similarly, omissions in PIFs are not always indicative of a lack of credibility: the significance of the omission must be taken into account.[65]

### 2.3.4. Materiality

It is clear from a long line of cases that an adverse finding of credibility based on contradictions in the claimant's or witness's testimony must be based on real contradictions or discrepancies[66] that are of a significant or serious nature.[67]

Inconsistency, misrepresentation or concealment should not lead to a rejection of the claim where these are not material to the claim. Where a claimant is found to be lying, and the lie is material to the claim, the panel must, nevertheless, look at all of the evidence and arrive at a conclusion on the entire body of evidence before it.

A number of decisions of the Federal Court make the point that if the claimant's story is being rejected outright, the contradictions must relate to central elements or critical points, i.e., the foundation of the claim.[68] Accordingly, when the testimony appears to be consistent as a whole, the panel must point out

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65 In *Singh, Gurmeet* v. *M.E.I.* (F.C.T.D., no. IMM-888-93), Reed, October 8, 1993, the Court stated at page 7: "The PIF is supposed to be a brief recitation of [a claimant's] claim, not a documentation of his whole case." This was expanded on in *Basseghi, Kourosh v. M.C.I.* (F.C.T.D., no. IMM-2227-94), Teitelbaum, December 6, 1994, where the Court stated at page 12: "It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for [a claimant] to say that what he said in oral testimony was an elaboration. *All* relevant and important facts should be included in one's PIF. The oral evidence should go on to explain the information contained in the PIF." In *Bains, Pritam Singh v. M.C.I.* (F.C.T.D., no. IMM-5366-97), Reed, August 10, 1998, the Court noted the PIF directs claimants to recount only the significant incidents of their claim in that document, and that it was therefore not unreasonable for the claimant to have omitted "very ordinary problems" (incidents of police harassment and detention), when the focus of his claim was on more serious events that occurred before and after that time frame.

66 *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.); *Ahmed v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 212 (F.C.A.); *Batra, Gurmeet Singh v. M.E.I.* (F.C.A., no. A-564-89), Hugessen, Desjardins, Décary, September 9, 1991; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Membreno-Garcia v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 291 (F.C.T.D.); *Fuentes-Valoy, Ruben Dario v. M.E.I.* (F.C.A., no. A-709-90), Mahoney, MacGuigan, Holland, February 9, 1993; *Mohamed, Haweya Abdi v. M.E.I.* (F.C.A., no. A-43-91), Mahoney, MacGuigan, Linden, February 11, 1993; *Fahiye, Mohamed Osman v. M.E.I.* (F.C.A., no. A-1321-91), Heald, MacGuigan, Linden, March 17, 1993.

67 *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Grewal, Kala Singh v. M.E.I.* (F.C.A., no. A-532-91), Mahoney, Robertson, Gray, January 27, 1993; *Fuentes-Valoy, Ruben Dario v. M.E.I.* (F.C.A., no. A-709-90), Mahoney, MacGuigan, Holland, February 9, 1993; *Fahiye, Mohamed Osman v. M.E.I.* (F.C.A., no. A-1321-91), Heald, MacGuigan, Linden, March 17, 1993; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.); *Guevara, Melida de Jesus Valle v. M.E.I.* (F.C.T.D., no. A-58-93), Nadon, December 17, 1993.

68 *Mahathmasseelan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 29 (F.C.A.); *Serrano, Jose Antonio Rodriguez v. M.E.I.* (F.C.A., no. A-646-91), Hugessen, Pratte,

contradictions or implausibilities that relate to central aspects of the claim to support a finding that the claimant is not credible.[69] Rejecting a claim based solely on the non-credibility of peripheral issues (including the issue of delay[70]), without evaluating the credibility of the evidence concerning the substance of the claim, constitutes a reviewable error.[71]

On the other hand, it has also been recognized in some cases that, while the discrepancies and contradictions taken individually might have seemed insignificant, when taken together and considered in context, they may support a finding of lack of credibility.[72]

(See also 2.1.3. General Finding of Lack of Credibility.)

### 2.3.5. Delay in Claiming Refugee Status and Other Related Factors

(See also Chapter 5 of *Interpretation of the Convention Refugee Definition in the Case Law*, IRB Legal Services, December 31, 1996, and addendum.)

In *Heer*, the Court of Appeal recognized that delay in claiming refugee status "is an important factor which the Board is entitled to consider in weighing a claim for refugee status."[73] Delay points to a lack of subjective fear of persecution,[74] the reasoning being that someone who was truly fearful would claim

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Desjardins, January 30, 1992. See also *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993.

69 *Amaniampong, Kofi v. M.E.I.* (F.C.A., no. A-1326-87), Heald (dissenting), Mahoney, Hugessen, May 19, 1989; *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993.

70 *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 48 (F.C.T.D.).

71 *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.) (escape from detention and destruction of false travel documents); *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.) (details of escape from jail and country and travel itinerary abroad were not consequential given the uncontradicted evidence of arrest, detention and mistreatment); *Takhar, Sukhjeevan Singh v. M.C.I.* (F.C.T.D., no. IMM-1961-98), Evans, February 19, 1999 ("it is not uncommon for those who are fleeing from persecution not to have regular travel documents and, as a result of their fears and vulnerability, simply to act in accordance with the instructions of the agent who organized their escape. … whether a person has told the truth about her or his travel documents has little direct bearing on whether the person is indeed a refugee"); *Ahangaran, Behzad v. M.C.I.* (F.C.T.D., no. IMM-301-98), McGillis, May 19, 1999 (the credibility findings were based solely on matters pertaining to his travel following his departure from his country, including use of false documents and identities). But see *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993 (alleged destruction of false passport was part of larger identity concern).

72 *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Njeme, Ali v. M.C.I.* (F.C.T.D., no. A-1614-92), Pinard, November 28, 1994.

73 *Heer, Karnail Singh v. M.E.I.* (F.C.A., no. A-474-87), Heald, Marceau, Lacombe, April 13, 1988.

74 See *Castillejos, Joaquin Torres v. M.C.I.* (F.C.T.D., no. IMM-1950-94), Cullen, December 20, 1994, where the Court stated, at page 4, that delay points to a lack of subjective fear and does not relate to the objective basis of the claim.

refugee status at the first opportunity.[75] On the other hand, some decisions of the Court have upheld conclusions by the Board that the claimant's conduct negated a well-founded fear of persecution.[76]

The Court of Appeal has also commented in *Hue* and *Huerta*, that the credibility of a claimant's fear cannot be disputed solely on the basis that the claim for refugee status was late in coming.[77] In *Huerta*, Mr. Justice Létourneau wrote:

> The delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant.[78]

The circumstances giving rise to the delay must be examined in each case in order to determine whether or not the delay can be said to be indicative of a lack of fear,[79] bearing in mind the special circumstances and pressures which refugees (e.g., abused spouses) frequently face.[80]

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75 As pointed out in James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), at page 53, "the Convention establishes [in Article 31(1)] an obligation on refugees to 'present themselves without delay to the authorities and show good cause for their illegal entry or presence.' It seems right, therefore, to inquire into the circumstances of any protracted postponement of a refugee claim as a means of evaluating the sincerity of the claimant's need for protection. ... Where there is no reasonable excuse for the delay, an inference of evasion going to credibility is often warranted."

76 In *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994, a decision rendered without reference to *Huerta, infra,* the Court upheld the CRDD's conclusion that the claimant's failure to make a claim in any of the countries through which he travelled for six months before arriving in Canada negated a well-founded fear of persecution in his native Romania. In *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996, the Court stated at page 6: "[The claimant's] failure to seize opportunities to claim refugee status earlier on his visits abroad or sooner after his last arrival in Canada were a basis on which the tribunal, in effect, found he had not established a well-founded fear of persecution in an objective sense. That conclusion is not unreasonable, on the evidence before the tribunal, whether or not there was some basis for his claim to fear of persecution." In a similar vein, in *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-879-94), MacKay, March 13, 1996, the Court stated at page 8: "I am not persuaded that the tribunal's conclusion was unreasonable when it found the [claimant's] leaving and re-entering Saudi Arabia [his country of nationality] several times indicated that he was not at risk, and was not inconsistent with his alleged difficulties with the government of Saudi Arabia."

77 *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 18, 1988; *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.). In *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 48 (F.C.T.D.), the Court commented that delay "is usually a corollary reason to what is considered to be more central for refusing a claim." See also *Dcruze, Jacob Ranjit v. M.C.I.* (F.C.T.D., no. IMM-2910-98), Rouleau, June 17, 1999, where the Court held that "[e]ven if the explanations for the delay lack credibility, such a finding is generally not determinative of the claim." However, the Court has on occasion upheld CRDD decisions rejecting a claim on the basis that the claimant's behaviour (e.g., long delays, returning to the country of alleged persecution) is totally incompatible with a subjective fear. See *Cruz, Fernando Rodriguez v. M.C.I.* (F.C.T.D., no. IMM-3838-93), Simpson, June 16, 1994; *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994; *Nimour, Zoubida Bougherara v. M.C.I.* (F.C.T.D., no. IMM-6254-98), Denault, September 7, 1999; *Kamana, Jimmy v. M.C.I.* (F.C.T.D., no. IMM-5998-98), Tremblay-Lamer, September 24, 1999.

78 *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), at 227.

For example, the following circumstances could be seen as negating the claimant's fear, but only if reasonable explanations are not provided by the claimant:

- Failing to flee one's country of origin at the first opportunity after the occurrence of a persecutory nature.[81]

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79 In *Mejia, Maria Esperanza Martinez v. M.C.I.* (F.C.T.D., no. IMM-1040-95), Simpson, July 29, 1996, the Court held that the CRDD erred by not squarely addressing whether it doubted the claimant's subjective fear (and by not mentioning that the claimant had been in hiding). In *Beltran, Luis Fernando Berrio v. M.C.I.* (F.C.T.D., no. IMM-829-96), Dubé, October 29, 1996, the Court held that since the CRDD did not question the claimant's credibility and had accepted as truthful his allegations regarding his problems in Colombia, it should explain why it did not accept the reasons he provided for not seeking police assistance and for the delay in presenting his claim in Canada. In *Lelo, Emmanuel Bernard v. M.C.I.* (F.C.T.D., no. IMM-865-98), Teitelbaum, December 22, 1998, the Court held that it was not sufficient to simply say, after noting a delay of four months, "That is not the attitude of someone who fears persecution." However, failure to determine the reason for the delay in leaving was not a sufficient basis to overturn the CRDD decision in *Ahmed, Leaquat v. M.C.I.* (F.C.T.D., no. IMM-3912-96), Richard, May 8, 1997, where the CRDD's remaining five conclusions relating to credibility were reasonably open to it and were central to the claim.

In *Gnana-Easwary, Rudrasigamany v. M.C.I.* (F.C.T.D., no. IMM-3823-97), Gibson, September 8, 1998, the Court took the CRDD to task for its circular conclusions regarding credibility and lack of a well-founded fear: "It is an error of law to conclude that the applicant's evidence is not credible because she has not established a well-founded fear by reason of reavailment and delay and at the same time to conclude that her explanations for reavailment and delay are to be rejected because her evidence is not to be believed."

80 In *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995, the Court noted, at page 3, that "Delay in making a claim can only be relevant from the date as of which [a claimant] begins to fear persecution." In *Diluna v. Canada (Minister of Employment and Immigration)* (1995), 29 Imm. L.R. (2d) 156 (F.C.T.D.), the Court held, in *obiter*, that the CRDD should have considered a psychiatric assessment that supported the claimant's assertion that she delayed seeking refugee status due to post-traumatic stress syndrome. In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, the Court held that in assessing the claimants's delay, being a victim of domestic violence, in leaving her country and making a claim in Canada, the CRDD should not have used the "objective" standard of the "reasonable man".

81 *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), where the claimant continued to work and attend classes; *Radulescu, Petrisor v. M.E.I.* (F.C.T.D., no. 92-A-7164), McKeown, June 16, 1993, where there was a two-year delay in leaving Romania after police beatings and telephone threats; *Rosales v. Canada (Minister of Employment and Immigration)* (1993), 23 Imm. L.R. (2d) 100 (F.C.T.D.), where the claimant delayed leaving for 9 months despite the disappearance of a political colleague; *De Beltran v. Canada (Secretary of State)* (1994), 28 Imm. L.R. (2d) 157 (F.C.T.D.), where there was a five-month delay in leaving El Salvador after receiving a threat; *Hristov, Hristo v. M.E.I.* (F.C.T.D., no. IMM-2090-94), Cullen, January 5, 1995, where the claimants delayed leaving Bulgaria, despite earlier opportunities to do so, even though they experienced physical attacks, break-ins at their home, and a fire-bombing of their car.

But see *Ezi-Ashi, James Chike v. S.S.C.* (F.C.T.D., no. IMM-1257-93), Wetston, February 28, 1994; *Zuniga, Alexis Ramon Garcia v. S.G.C.* (F.C.T.D., no. IMM-118-94), Teitelbaum, July 4, 1994. In *Farahmandpour, Tahereh v. M.C.I.* (F.C.T.D., no. IMM-92-97), Dubé, December 15, 1997, the CRDD erred in not considering the tragic situation the 78-year-old claimant found herself after the death of her husband and that the delays (en route and in Canada) were explained by illness.

- Failing to go into hiding immediately after learning that one may be in danger.[82]

- Failing to claim or to await the outcome of a claim to Convention refugee status in countries where the claimant resided or sojourned or through which he or she travelled before coming to Canada.[83] For this factor to be relevant the country in question must be a signatory to the

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82 *Ramirez, Jose v. M.E.I.* (F.C.T.D., no. 92-A-7114), Noël, June 2, 1993, where the CRDD did not find it credible that the claimant would have returned to the family farm after two alleged death threats; *Tao, Zhen v. M.E.I.* (F.C.T.D., no. 92-A-7164), Noël, June 22, 1993, where the CRDD did not believe the claimant spent a year in hiding while, at the same time, procuring official government documents. But see, however, *Wong v. Canada (Minister of Employment and Immigration)* (1992), 141 N.R. 236 (F.C.A.), where the CRDD erroneously concluded that the claim lacked the required subjective component because the claimant had not gone into hiding immediately after hearing she was under surveillance; *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.), where the CRDD erroneously drew an adverse inference from the fact that the claimant did not go into hiding, though testifying that he withdrew from some activities for a time and took precautions in public (the Court found these actions to be reasonable in the circumstances). In *Sabaratnam, Thavakaran v. M.E.I.* (F.C.A., no. A-536-90), Mahoney, Stone, Robertson, October 2, 1992, the Court commented, at page 2, that a person "successfully hiding from his persecutor can scarcely be said to be experiencing no problems," and went on to say that "[s]uch a finding is perverse." And in a similar vein, in *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), at 393, the Court held that the CRDD's finding that the claimant was able to remain in China for about a month following the abandonment of his job "without any adverse incident," ignored "totally the [claimant's] testimony that he was in hiding for a large part of this period."

83 *Saez, Maritza Elizabeth Lagos v. M.E.I.* (F.C.T.D., no. 92-A-6908), Dubé, June 23, 1993; *Bogus, Mehmet v. M.E.I.* (F.C.T.D., no. T-153-93), Rothstein, November 26, 1993; *Thandi, Ajaib Singh* v. *S.S.C.* (F.C.T.D., no. IMM-4547-93), Nadon, May 27, 1994; *Lameen, Ibrahim v. S.S.C.* (F.C.T.D., no. A-1626-92), Cullen, June 7, 1994; *Ilie, Lucian Ioan v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994; *Wey, Edward Kolawole v. S.S.C.* (F.C.T.D, no. IMM-2758-94), Gibson, February 21, 1995; *Memarpour, Mahdi v. M.C.I.* (F.C.T.D., no. IMM-3113-94), Simpson, May 25, 1995; *Hristov, Hristo v. M.E.I.* (F.C.T.D., no. IMM-2090-94), Cullen, January 5, 1995; *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996; *Ali, Salah Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2402-95), Tremblay-Lamer, April 25, 1996. In *Sabapathy, Thevi v. M.C.I.* (F.C.T.D., no. IMM-1507-96), Campbell, March 27, 1997, the claimant abandoned protection in the U.K. and delayed making a claim in Canada. In *Madoui, Nidhal Abderrah v. M.C.I.* (F.C.T.D., no. IMM-660-96), Denault, October 25, 1996, before the Court the claimant relied on statistics showing that Italy, the country where he had sojourned, rarely granted refugee status to claimants like him to argue, unsuccessfully, that he had no obligation to seek refugee status there. In *Bains, Gurmukh Singh v. M.C.I.* (F.C.T.D., no. IMM-3698-98), Blais, April 21, 1999, the claimant relied, unsuccessfully, on the fact that he had been waiting five to six years for a decision on his claim in England before deciding to come to Canada. In *Vairamuthu, Rajanayagam v. M.C.I.* (F.C.T.D., no. IMM-5407-97), Nadon, December 1, 1998, the Court held that, if the claimants had feared for their lives, they would have made claims in the United States where they stayed for four months after their claims were rejected in Canada.

But note those cases where the Court found that the claimant had provided plausible and uncontradicted explanations for not seeking to remain or claim refugee status in various countries en route to Canada, e.g., *Hue, Marcel Simon Chang Tak v. M.E.I.* (F.C.A., no. A-196-87), Marceau, Teitelbaum, Walsh, March 8, 1988, where the Court held that the IAB erred by overlooking that the claimant did not need to seek protection as long as he was a sailor on a ship; *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.), where the Ghanaian claimant provided reasons why he could not have safely stayed in neighbouring Togo or Nigeria; *Tung* v. *Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), where the claimant, who was at all times in transit, provided reasons which led him to select Canada as a safe haven over other countries he had considered with the assistance of his agent; *Ahani, Roozbeh v. M.C.I.* (F.C.T.D., no. IMM-4985-93), MacKay, January 4, 1995, where the claimant was in transit only for 9 days; *El-Naem v. Canada*

*Convention relating to the Status of Refugees*.[84]

- Returning to one's country of origin,[85] obtaining or renewing a passport or travel document,[86] or leaving or emigrating through lawful channels.[87] Some factors to consider in assessing a

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*(Minister of Citizenship and Immigration)* (1997), 37 Imm. L.R. (2d) 304 (F.C.T.D.), where the Court held that the claimant's one-year sojourn in Greece without claiming refugee status there was reasonable given his age (19), lack of funds and family support there, and his desire to come to Canada where his brother had made a successful refugee claim.

In *Basmenji, Aiyoub Choubdari v. M.C.I.* (F.C.T.D., no. IMM-4811-96), Wetston, January 16, 1998, the Court rejected the proposition that the claimant, an Iranian married to a Japanese national, should have attempted to claim some form of status while in Japan, prior to making a claim for refugee status in Canada. A similar position was taken in *Priadkina, Yioubov v. M.C.I.* (F.C.T.D., no. IMM-2034-96), Nadon, December 16, 1997, where the Court stated that the claimants had no duty to seek refugee status in Russia or Israel (the claimants were Russians and Jews from Kazakhstan), before claiming in Canada. However, in *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum, April 1, 1998, the Court held that the CRDD did not err by taking into account the failure of the claimants, nationals of Ukraine, to investigate the possibility of Polish citizenship: "the Board was perfectly entitled to find that this was inconsistent with a well-founded fear of persecution."

84 In *Ilie, Lucian Iaon v. M.C.I.* (F.C.T.D., no. IMM-462-94), MacKay, November 22, 1994, the Court stated that the CRDD is entitled to take notice of the status of countries that are signatories to the Convention (these are listed in Annex IV of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*) and may also assume that such countries will meet their obligation to implement the Convention within their own territory, unless evidence to the contrary is adduced. But see *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.), at 394, where Mr. Justice Stone noted: "There is no evidence that any of these countries in question had ratified the 1951 *U.N. Convention* and the 1967 *Protocol* or that they had adopted laws implementing those instruments."

85 *Caballero, Fausto Ramon Reyes v. M.E.I.* (F.C.A., no. A-266-91), Marceau (dissenting), Desjardins, Létourneau, May 13, 1993; *Larue, Jacqueline Anne v. M.E.I.* (F.C.T.D., no. 92-A-6666), Noël, May 13, 1993; *Tejani, Abdulkarim v. M.E.I.* (F.C.T.D., no. 92-T- 1306), Reed, June 2, 1993; *Abou El Joud, Mohamad Ali v. M.E.I.* (F.C.T.D., no. A-21-93), Nadon, January 19, 1994; *Bogus, Mehmet v. M.E.I.* (F.C.T.D., no. T-153-93), Rothstein, November 26, 1993; *Zergani, Ahmad Jassemi v. M.E.I.* (F.C.A., no. A-311-92), Heald, Stone, McDonald, April 12, 1994; *Galdamez, Santo Peraza v. M.E.I.* (F.C.T.D., no. IMM-1544-94), McKeown, December 9, 1994; *Hoballah, Hassane v. M.E.I.* (F.C.T.D., no. IMM-3670-93), Joyal, January 10, 1995; *Gabeyehu, Bruck v. M.C.I.* (F.C.T.D., no. IMM-863-95), Reed, November 8, 1995; *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996; *Ali, Salah Mohamed v. M.C.I.* (F.C.T.D., no. IMM-2402-95), Tremblay-Lamer, April 25, 1996.

But see *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at 304, where the Court pointed out that the former Immigration Appeal Board (I.A.B.) ignored evidence that the claimant's brief return to his homeland was prompted by considerations for the safety of his family and he had obtained exit papers there enabling him to leave; *Aragon, Luis Roberto v. M.E.I.* (F.C.T.D., no. IMM-4632-93), Nadon, August 12, 1994, where the Court held that CRDD had not properly considered the circumstances surrounding the claimant's visit to his country (he went to see his mother); *Parada, Felix Balmore v. M.C.I.* (F.C.T.D., no. A-38-92), Cullen, March 6, 1995, where the claimant alleged he had to return to obtain funds and his passport and remained in hiding until he left (CRDD made no adverse finding of credibility). In *Kanji, Mumtaz Badurali v. M.C.I.* (F.C.T.D., no. IMM-2451-96), Campbell, April 4, 1997, the Court held that since the CRDD did not make an adverse finding of credibility, it erred in finding, on the basis of the purely circumstantial evidence of returns to India, that the claimant had reavailed herself of protection and did not have a subjective fear. In *Yoganathan, Kandasamy v. M.C.I.* (F.C.T.D., no. IMM-3588-97), Gibson, April 20, 1998, the Court noted that as long as the claimant had his "sailor's papers" and a "ship to sail on," he was safe from persecution in Sri Lanka (to which he returned from time to time) and did not have to seek protection

return to one's country include: the purpose of the return; the manner in which the claimant effected the return; how the claimant passed the time on return (e.g., whether the claimant was in hiding); whether the evidence indicates that the claimant put him- or herself at risk by returning; whether any difficulties were experienced on return; the claimant's explanation for the return; and whether the explanation is reasonable.

- Delay in making a refugee claim in Canada.[88] However, a claim may be credible even though it was not made at the earliest possible opportunity. A genuine refugee may well wait until he or she is safely in the country before making a claim and cannot be expected, in every case, to claim refugee status at the port of entry. A genuine refugee may not be aware immediately of his or her entitlement to such status and may be in the country for some time before becoming aware of the

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elsewhere; at the first opportunity following notification that his employment contract would not be renewed, he made his claim to refugee status.

86 *Tsafack, David v. M.C.I.* (F.C.T.D., no. IMM-1979-95), Pinard, April 10, 1996; *Panta, Paul Acuna v. M.C.I.* (F.C.T.D., no. T-2217-93), Simpson, July 26, 1996; *Choque, Juan Jose Orozco v. M.C.I.* (F.C.T.D., no. IMM-1076-96), Jerome, July 24, 1997. See, however, *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), where the Court pointed out that the I.A.B. ignored the fact that the claimant was able to obtain his passport (and exit papers) through his brother's contacts with the government; *Jbel, Bouazza v. M.E.I.* (F.C.T.D., no. A-1058-92), Gibson, September 10, 1993, where the fact that claimant already had obtained a passport before the occurrence that motivated him to leave his country was found not to be inconsistent with his decision to leave for the reason he stated; *Yada, Rosa Emilia Cardoza v. M.C.I.* (F.C.T.D., no. IMM-4912-96), MacKay, January 16, 1998, where the claimant applied for a new El Salvadoran passport after coming to Canada on the instruction of a Canadian Immigration officer. In *Chandrakumar, Thurairajah v. M.E.I.* (F.C.T.D., no. A-1649-92), Pinard, May 16, 1997, the Court held that the CRDD erred in asuming that the simple action of renewing one's passport outside the country of nationality, without more, was sufficient to establish re-availment of protection.

87 *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.); *Choque, Juan Jose Orozco v. M.C.I.* (F.C.T.D., no. IMM-1076-96), Jerome, July 24, 1997; *Mejia, Erdulfo v. M.C.I.* (F.C.T.D., no. IMM-4548-96), Heald, September 26, 1997.

88 *Hurt v. Canada (Minister of Manpower and Immigration)*, [1978] 2 F.C. 340 (C.A.); *Surujpal v. Canada (Minister of Employment and Immigration)* (1985), 60 N.R. 73 (F.C.A.); *Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.); *Hanna, Nwora Kiriakos v. M.E.I.* (F.C.T.D., no. IMM-220-93), Cullen, February 3, 1994; *Ezi-Ashi, James Chike* v. *S.S.C.* (F.C.T.D., no. IMM-1257-93), Wetston, February 28, 1994; *Thandi, Ajaib Singh v. S.S.C.* (F.C.T.D., no. IMM-4547-93), Nadon, May 27, 1994; *Marquez, Ricardo* v. M.E.I. (F.C.T.D., no. IMM-3166-93), Simpson, June 1, 1994; *Lameen, Ibrahim* v. *S.S.C.* (F.C.T.D., no. A-1626-92), June 7, 1994; *Carranza-Gonzalez v. Canada (Minister of Employment and Immigration)* (1994), 26 Imm. L.R. (2d) 118 (F.C.T.D.); *Kaur, Harbans v. M.C.I.* (F.C.T.D., no. IMM-1990-94), MacKay, April 6, 1995; *Hankali, Levent v. M.C.I.* (F.C.T.D., no. IMM-2575-94), MacKay, March 14, 1996; *Panta, Paul Acuna v. M.C.I.* (F.C.T.D., no. T-2217-93), Simpson, July 26, 1996.

Canadian refugee determination procedure.[89] Likewise, the fact that a claim was made only after the claimant received the advice of a lawyer does not preclude a genuine claim.[90]

- Entry into Canada without proper documentation[91] or destroying one's (false) travel documents en route.[92] — Section 69.1 (10.1)(a) of the *Immigration Act* changes the effect of a split decision on the claim when identity documents are disposed of or destroyed without valid reason.[93]

(With respect to identity documents and corroboration of identity, see also *Commentary on Undocumented and Improperly Documented Claimants,* IRB Legal Services, March 11, 1997.)

### 2.3.6. Demeanour and Related Factors

The claimant's demeanour, including factors such as "vagueness" or "evasiveness" or "confusing" testimony, may be a relevant factor in assessing credibility.[94] The Federal Court has explicitly

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89 In *Williams, Debby v. S.S.C.* (F.C.T.D., no. IMM-4244-94), Reed, June 30, 1995, the Court accepted as "entirely credible" the claimant's explanation that she did not know she was entitled to claim refugee status on the ground of spousal abuse until after she had contacted a lawyer.

90 In *Papsouev v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 48 (F.C.T.D.), the Court noted: "It is perfectly conceivable that a lawyer would advise a claimant who fits both criteria to file an application for permanent residence as opposed to a refugee claim."

91 In *Balayah, Khadar Yusuf v. M.C.I.* (F.C.T.D., no. A-1395-92), Simpson, July 29, 1996, the Court upheld the CRDD decision that it was implausible that the claimant would leave his only identity documents behind in a country torn by civil war given that he had a week to prepare for his departure. But see *Thurairajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994, where the Court held that the CRDD had failed to consider the claimant's reasonable explanation as to why he did not have his identity documents. See also *Abebe, Hanna v. M.C.I.* (F.C.T.D., no. IMM-2174-96), Teitelbaum, March 25, 1997.

92 *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Farah, Kalthoum Abdirahman v. M.E.I.* (F.C.T.D., no. 92-A-6032), Reed, May 26, 1993; *Mohammad, Abdul Hashim v. M.C.I.* (F.C.T.D., no. IMM-3095-96), Gibson, July 30, 1997. But see *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm. L.R. (2d) 58 (F.C.A.); *Nadali, Mohamad Reza v. M.C.I.* (F.C.T.D., no. IMM-1889-96), Joyal, May 27, 1997.

93 This provision has been considered in: *Sebastiampillai, Mary Jenita v. M.C.I.* (F.C.T.D., no. IMM-866-94), Reed, December 5, 1994; *Gebremariam, Himanot Tefera v. M.C.I.* (F.C.T.D., no. IMM-62-94), Muldoon, March 8, 1995; *Jradj, Khalil Alib v. M.E.I.* (F.C.T.D., no. IMM-1680-94), Gibson, March 16, 1995.

94 *Leung, Tak On v. M.E.I.* (F.C.A., no. A-756-91), Stone, Linden, McDonald, July 8, 1993; *Wen, Li Xia v. M.E.I.* (F.C.A., no. A-397-91), Stone, Linden, McDonald, June 10, 1994; *Mostajelin, Mohammad v. M.E.I.* (F.C.A., no. A-122-90), Stone, Desjardins, Décary, January 15, 1993; *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993 (claimant's testimony was found to be "totally devoid of any emotion or personal involvement" to be believed). In *Sun, Yuerong v. M.E.I.* (F.C.T.D., no. 92-A-7176), Noël, June 23, 1993 (claimant's testimony "went from being crystal clear to nebulous when confronted with questions by the members"); *Arumugam, Kandasamy v. M.E.I.* (F.C.T.D., no. IMM-1406-93), Reed, January 20, 1994 (claimant's demeanour when reciting answers concerning facts set out in the PIF differed from that when giving evidence about matters outside his narrative); *Sandhu, Jasbir Singh v. M.E.I.* (F.C.T.D., no. 93-T-46), MacKay, March 3, 1994 (claimant was found not to be spontaneous, answered with hesitation and evasiveness, and did not answer in some areas in a direct and precise

recognized that every judge's assessment of credibility is influenced by a witness's demeanour. The Court cautioned that, although the reasons for reaching a conclusion on this issue may be partly subjective, they must also be founded on objective considerations.[95]

In assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance of a witness,[96] but on objective considerations that flow from the witness's testimony, such as the witness's frankness and spontaneity, whether the witness is hesitant or reticent in providing information, and the witness's attitude and comportment before the tribunal.[97]

Moreover, there must be a rational connection between the claimant's demeanour and the conclusions drawn therefrom.[98] For example, individual personality traits or cultural differences should be taken into account (as these could cause the witness to leave a misleading impression).[99]
A claimant's medical condition may also be a relevant factor when assessing demeanour.[100] Accordingly, a failure to address this factor in its reasons could be a reviewable error where the Refugee Division has found the claimant not to be credible.

The demeanour of a witness is not an infallible guide as to whether the truth is being told, nor is it determinative of credibility. It would be a rare case where demeanour, alone, would be sufficiently

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manner). However, in *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993, the Court stated at pages 1-2:

> The Refugee Division gave three reasons why they said they did not believe the [claimant]. ... The second reason given was that the [claimant] had been "vague" because he could not specify whether the attacking forces had used bombs or artillery in the raid on Hargeisa in May 1988: that, in our view, was both unfair and unreasonable. The victims of military attacks on civilian populations cannot be expected to appreciate the niceties of the various systems employed to deliver explosive charges against them.

95 *King-Adjei, Augustine v. M.E.I.* (F.C.T.D., no. T-1584-91), Jerome, March 16, 1992.

96 In *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 168 (F.C.T.D.), the Court questioned how, without further explanation, the claimant's occupation (as a fisherman) could be determined from his demeanour.

97 See *Paré v. Goulet*, [1959] Que.S.C. 348, at 354, per Marquis J.

98 In *Mitac, Josef v. M.C.I.* (F.C.T.D., no. IMM-5988-98), Lutfy, September 13, 1999, the Court held that there was no rational connection, in this case, between the claimants' comportment ("smiling and laughing" and "facial expressions") and the panel's conclusion that they were not Roma.

99 *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.), at 298-299. In *Shaker, Tahereh v. M.C.I.* (F.C.T.D., no. IMM-3449-98), Reed, June 30, 1999, the Court commented that, in the circumstances, it was not apparent why one should have expected the claimant to become emotional when describing a beating, so long after the event.

100 In *Sanghera v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 194 (F.C.T.D.), the CRDD ignored evidence before it in the form of a psychiatric report that the claimant suffered from post-traumatic stress disorder causing him to become forgetful, lost in his train of thought and afraid, especially when the past was discussed. See also *Chen, Ze Yung v. M.C.I.* (F.C.T.D., no. IMM-4381-94), Cullen, July 19, 1995; *Sanchez, Rosa v. M.C.I.* (F.C.T.D., no. IMM-270-97), Heald, January 18, 1998. (See also 2.4.9. Medical Reports.)

material to the claim to undermine the entire testimony in support of a claim. Generally, demeanour is one of several indicators of a lack of credibility. In general, the courts have attempted to diminish the role of demeanour in the final assessment of credibility.[101]

Assessments of credibility based on demeanour are open to scrutiny on judicial review. Accordingly, clear and cogent reasons for such findings must be given.[102]

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101 In *Plumb v. W.C. MacDonald Regd.*; *Latimer* v. *Foster Tobacco Co.*, [1926] 1 D.L.R. 899 (Ont.C.A.), reversed on other grounds (*sub nom. Latimer v. W.C. MacDonald Regd.*; *Plumb v. Jasperson*, [1928] 3 D.L.R. 870 (P.C.), Smith J. stated at 918-919:

> There are fortunately few cases in which the credibility of witnesses has to be determined by a trial Judge on conclusions drawn alone from the appearance and demeanour of these witnesses in the box. This may be an element of more or less weight according to circumstances, but at best it is a very uncertain guide ... Conduct and demeanour are at all events of minor importance where the whole evidence and surrounding circumstances furnish guides of a more reliable nature.

102 This is illustrated by *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.), at 299, where the Court stated:

> The respondent suggested that the [claimant] was ... evasive in answering questions. However, the only suggested evasiveness occurred when the [claimant] clearly did not understand the question and when that was straightened out he answered the question. In my view, it is not evasion to misunderstand a question and grope for answers.

In *Shakir, Hani Thabit v. M.C.I.* (F.C.T.D., no. IMM-2671-95), Reed, April 3, 1996, the Court recognized, at page 5, that a transcript "does not show pauses between questions and answers, or within an answer. It does not show ... [a claimant's] 'body language'."

## 2.4. RELYING ON TRUSTWORTHY EVIDENCE TO MAKE ADVERSE FINDINGS OF CREDIBILITY

### 2.4.1. Trustworthy Evidence on Which to Base Findings

The Federal Court has emphasized that an adverse finding of credibility must be supported by trustworthy evidence.[103] When part of the testimony raises questions, the decision-maker must have trustworthy evidence to the contrary,[104] or must find this part of the testimony inconsistent or inherently suspect or improbable,[105] if it is to be rejected.

In determining whether the evidence which contradicts the claimant's testimony is trustworthy, factors such as the source of the information, the objective of the person in providing it and the methods used to gather the information should be considered. In addition, the decision-maker must also determine the weight or probative value to be assigned to such contradictory evidence.[106] In this regard, the decision-maker must be satisfied that the evidence relied on is probably so, not just possibly so.[107]

### 2.4.2. Presumption of Truthfulness

The Court of Appeal, in *Maldonado*[108] and on several other occasions, set out the important principle that when a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness.[109]

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103 *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm. L.R. (2d) 58 (F.C.A.); *Siddique, Ashadur Rahman v. M.E.I.* (F.C.A., no. A-1137-88), Pratte, Hugessen, Desjardins, November 23, 1989; *Boucher v. Canada (Minister of Employment and Immigration)* (1989), 105 N.R. 66 (F.C.A.); *Frimpong v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 183 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 310 (F.C.A.).

104 *Ansong v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 94 (F.C.A.).

105 *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.); *Leung v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 43 (F.C.A.).

106 *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992.

107 *Orelien v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 592 (C.A.), at 605.

108 *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.), at 305, where the Court said: "When [a claimant] swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."

109 *Thind, Ranjit Singh v. M.E.I.* (F.C.A., no. A-538-83), Heald, Mahoney, Lalande, October 27, 1983; *Villarroel v. Canada (Minister of Employment and Immigration)* (1979), 31 N.R. 50 (F.C.A.), also reported as *Re Salvatierra and Canada (Minister of Employment and Immigration)* (1979), 99 D.L.R. (3d) 525 (F.C.A.); *Permaul v. Canada (Minister of Employment and Immigration)* (1983), 53 N.R. 323 (F.C.A.); *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Sathanandan v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 310 (F.C.A.); *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Desjardins, Marceau, Décary, May 6, 1992; *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L.R. (2d) 134 (F.C.T.D.); *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.); *Owusu, Anthony* v. *M.C.I.* (F.C.T.D., no. IMM-2422-94), Wetston, May 4, 1995.

However, in *Hernandez*,[110] the Court pointed that this presumption does not extend to the inferences that the claimant draws from those facts:

> the presumption of truth that applies to the facts recounted by the [claimant] does not apply to the deductions made from those facts.

This proposition was more fully explained in *Derbas*,[111] where the Court stated:

> By accepting the [claimant's] version of the events as fact, the Board was certainly not bound to accept the interpretation he puts on those events. The Board still had to look at whether the events, viewed objectively, provided sufficient basis for a well-founded fear of persecution.

Thus, the Board is entitled to reject some or all of the inferences—especially if they are speculative in nature—drawn by the claimant even in the absence of an adverse finding of credibility.[112]

### 2.4.3. Implausibilities

A decision-maker does not necessarily have to accept a witness's testimony simply because it was not contradicted at the hearing. The Refugee Division may reject testimony which is uncontradicted if that evidence does not accord with the probabilities affecting the case as a whole.[113] In this respect, the British Columbia Court of Appeal stated in *Faryna v. Chorny*:[114]

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

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110 *Hernandez, Ileana Araceli v. M.E.I.* (F.C.T.D., no. IMM-1511-93), Denault, May 9, 1994.

111 *Derbas, Ahmad Issa v. S.G.C.* (F.C.T.D., no. A-1128-92), Pinard, August 18, 1993.

112 *Prasad, Mahendra v. S.S.C.* (F.C.T.D., no. A-1109-92), Jerome, October 13, 1994. In *Hercules, Pedro Monge v. M.C.I.* (F.C.T.D., no. IMM-1196-93), Gibson, August 25, 1993, the Court stated: "I find that there did not exist an obligation on the part of the CRDD in this case to accept sworn allegations as true, even though credibility is not in question, where those allegations are in the nature of a speculative conclusion, and whether or not that speculation is well-founded."

113 *Alizadeh, Satar v. M.E.I.* (F.C.A., no. A-26-90), Stone, Desjardins, Décary, January 11, 1993; *Shahamati, Hasan v. M.E.I.* (F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 24, 1994, where the Court stated that "the Board is entitled, in assessing credibility, to rely on criteria such as rationality and common sense." See also *Oduro, Prince v. M.E.I.* (F.C.T.D., no. 92-A-7171), Noël, June 2, 1993 (claimant escaped from prison with the assistance of a guard and did not encounter any checkpoints when leaving the country); *Chand, Saroop v. M.E.I.* (F.C.T.D., no. 92-T-2035), Gibson, January 26, 1994. In *Rahmaty, Parviz v. M.C.I.* (F.C.T.D., no. IMM-1221-95), Jerome, May 13, 1996, in upholding the CRDD's decision the Court noted at page 3: "The essence of the Board's decision was that it was implausible for a person in [the claimant's] position to be able to supply only the vague and general responses which he provided at the hearing."

114 *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357, per O'Halloran J.A.

It is not generally sufficient, however, simply to indicate that the claimant's story is "implausible", without explaining further the reasoning behind that finding.[115] The decision-maker must be able to articulate why the testimony that is being rejected is clearly out of line with what is reasonable in the circumstances, and should ensure that any such conclusion is supported by the evidence. A claimant's testimony ought not to be lightly or readily dismissed.

It is not sufficient for the decision-maker merely to indicate that he or she prefers to accept what is considered to be a more reasonable explanation of the events or to go on to construct one's own hypothesis as to how events actually unfolded.[116] On this point, the Court has indicated that considerable caution is required in this area, especially when assessing the norms and patterns of different cultures and the practices and procedures of different political, police and social systems.[117]

When making an assessment involving implausibility, reference must also be made to relevant evidence and explanations offered by the claimant which could potentially refute the conclusion of an adverse finding on implausibility.[118] While the panel is entitled to weigh the evidence and assess its credibility, it cannot reach a conclusion that is so inconsistent with the preponderance of the relevant evidence so as to be unreasonable.[119]

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115 In *Alza, Julian Ulises v. M.C.I.* (F.C.T.D., no. IMM-3657-94), MacKay, March 26, 1996, the Court noted that while findings based on implausibilities may not be readily documented by specific reasons, the general factors in the claimant's evidence or the surrounding circumstances which make the allegations implausible should be referred to in the CRDD's decision.

116 *Dumitru v. Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 62 (F.C.T.D.).

117 *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.); *Ye, Zhi Bing v. M.E.I.* (F.C.A., no. A-711-90), Stone, MacGuigan, Henry, June 24, 1992; *Xu, Zhe Ru v. M.E.I.* (F.C.A., no. A-666-90), Mahoney, Stone, Robertson, September 8, 1992; *Ankrah, Bismark v. M.E.I.* (F.C.T.D., no. T-1986-92), Noël, March 16, 1993; *Ibrahim, Mohamed Abdisalam Hagi v. M.E.I.* (F.C.A., no. A-382-91), Heald, MacGuigan, Linden, March 17, 1993; *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993; *Pathmanathan, Ambika v. M.E.I.* (F.C.T.D., no. 93-A-67), McKeown, June 24, 1993; *Karikari v. Canada (Minister of Employment and Immigration)* (1994), 169 N.R. 131 (F.C.A.); *Gyimah, Joycelyn v. M.C.I.* (F.C.T.D., no. IMM-1011-93), Gibson, November 10, 1995. In *Najeebdeen, Mohamed Saly v. M.C.I.* (F.C.T.D., no. IMM-5438-98), Lutfy, July 30, 1999, the Court held that it was wrong to extrapolate that a specific incident alleged by a claimant is implausible because it runs counter to the general political relationship between groups (the Tamil Muslim community and the Sri Lankan government); moreover, the findings of implausbility were based on documentary evidence with no attempt to explain the reasons for disbelieving the claimant's testimony. In *Pluhar, Lubomir v. M.C.I.* (F.C.T.D., no. IMM-5334-98), Evans, August 27, 1999, and in *Mitac, Josef v. M.C.I.* (F.C.T.D., no. IMM-5988-98), Lutfy, Deptember 13, 1999, the Court pointed out that reliance on a tribunal member's observations concerning a claimant's "physical appearance" is, in the absence of expert evidence, "inherently dangerous."

The Court has also cautioned, in a number of cases, about the pitfalls of interpreting evidence through "Western concepts", "Canadian paradigms" or "North American logic and experience". See, respectively: *Ye, supra*; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 269 (F.C.T.D.); and *Rahnema v. Canada (Solicitor General)* (1993), 22 Imm. L.R. (2d) 127 (F.C.T.D.). See also *Sun v. Canada (Minister of Employment and Immigration)* (1993), 24 Imm. L.R. (2d) 226 (F.C.T.D.).

118 *Xu, Zhe Ru v. M.E.I.* (F.C.A., no. A-666-90), Mahoney, Stone, Robertson, September 8, 1992.

119 *Leung, Shuk-Shuen v. M.E.I.* (F.C.T.D., no. A-1162-92), Jerome, May 20, 1994; *Rodriguez, Maria Angelica Magan v. M.C.I.* (F.C.T.D., no. IMM-4790-94), MacKay, March 1, 1996.

Decisions based on findings of implausibility are vulnerable on a review by a superior court. The Federal Court has indicated that it will not extend undue deference to the Board's assessment of plausibility, as such assessments are based on the drawing of inferences and are subject to challenge, especially when they are based on extrinsic criteria such as "rationality" or "common sense".[120]

On the other hand, when the inferences drawn that lead to a finding of incredibility are not so unreasonable as to warrant the intervention of the Court, the findings will be allowed to stand. Put another way, the Court will not substitute its discretion for that of the panel if it was open to the panel to find as they did, even if the Court might have drawn different inferences or found the evidence to be plausible.[121]

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120 In *Giron v. Canada (Minister of Employment and Immigration)* (1992), 143 N.R. 238 (F.C.A.), the Court stated at 239:

> The Convention Refugee Determination Division of the Immigration and Refugee Board "the Board") chose to base its finding of lack of credibility here for the most part, not on internal contradictions, inconsistencies, and evasions, which is the heartland of the discretion of triers of fact, but rather on the implausibility of the claimant's account in light of extrinsic criteria such as rationality, common sense, and judicial knowledge, all of which involve the drawing of inferences, which triers of fact are in little, if any, better position than others to draw.

See also *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Ansong v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 94 (F.C.A.); *Salamat v. Canada (Immigration Appeal Board)* (1989), 8 Imm. L.R. (2d) 58 (F.C.A.); *Ye, Zhi Bing v. M.E.I.* (F.C.A., no. A-711-90), Stone, MacGuigan, Henry, June 24, 1992; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D); *Ayimadu-Antwi, Yaw v. M.E.I.* (F.C.T.D., no. A-1086-92), McKeown, October 29, 1993; *Callejas v. Canada (Minister of Employment and Immigration)* (1994), 23 Imm. L.R. (2d) 253 (F.C.T.D.). In *Samani, Hassan v. M.C.I.* (F.C.T.D., no. IMM-4271-97), Hugessen, August 19, 1998, the Court commented that a finding of implausibility is rarely convincing when it is based on behaviour the Board finds dangerous: politically committed persons often take risks. See also *Bukaka-Mabiala, Aime v. M.C.I.* (F.C.T.D., no. IMM-4296-98), Rouleau, June 18, 1999, to that effect.

121 In *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.), at 316-317, the Court clarified the case law on this point:

> It is correct, as the court said in *Giron*, that it may be easier to have a finding of implausibility review[ed] where it results from inferences than to have a finding of non-credibility review[ed] where it results from the conduct of the witness and from inconsistencies in the testimony. The court did not, in saying this, exclude the issue of the plausibility of an account from the Board's field of expertise, nor did it lay down a different test for intervention depending on whether the issue is "plausibility" or "credibility".
>
> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony ... As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

Subsequent decisions have held this to mean that the same standard of judicial deference that applies to findings of credibility also applies to findings of implausibility: *Babchine, Igor v. M.C.I.* (F.C.T.D., no. IMM-768-95), Cullen, February 15, 1996. See also *Ayodele, Abiodun v. M.C.I.* (F.C.T.D., no. IMM-4812-

### 2.4.4. Criminal Activities in Canada

In *Fouladi*,[122] the Federal Court stated that it is within the Board's jurisdiction to take account of an offence which was committed in Canada and which involved deceit as a factor in assessing the claimant's credibility. Otherwise, criminality in Canada is generally an irrelevant factor in assessing credibility.

### 2.4.5. Corroborative Evidence

Normally, unless the Board had valid reasons to question the credibility of the claimant, it would be an error to require corroborating evidence in order to believe the claimant's evidence.[123] Thus, a failure to offer documentation cannot be linked to the claimant's credibility, in the absence of evidence to contradict the allegations.[124]

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96), Gibson, December 30, 1997, which reaffirmed *Aguebor* as the central authority on the review of implausibility findings.

122 In *Fouladi, Esmaeil v. M.C.I.* (F.C.T.D., no. IMM-1405-94), Reed, December 9, 1994, the claimant had been convicted of a fairly serious charge of fraud committed in Canada. The Court stated, at page 5, that the CRDD "may discount much of the [claimant's] story if they conclude that he is not a person who concerns himself about whether or not he tells the truth."

123 *Ovakimoglu v. Canada (Minister of Employment and Immigration)* (1983), 52 N.R. 67 (F.C.A.); *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L.R. (2d) 134 (F.C.T.D.); *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 39 (F.C.T.D.). The rationale for this general principle appears to be found in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, which states:

> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. ...
>
> 197. The requirement of evidence should not thus be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. ...

However, paragraph 197 of the *Handbook* adds that

> Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

124 *Selvarajah, Rajkumar v. M.E.I.* (F.C.A., no. A-342-91), Heald, Stone, McDonald, April 14, 1994; *Oblitas, Jorge v. M.C.I.* (F.C.T.D., no. IMM-2489-94), Muldoon, February 2, 1995. In *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999, the Court commented that it is unrealistic to require a refugee claimant to have with her paperwork and documents detailing her arrest history in the country from which she just fled. However, in *Syed, Naqeeb-Ur-Rehman v. M.C.I.* (F.C.T.D., no. IMM-1613-97), MacKay, March 13, 1998, the Court held that, given that the CRDD found the claimant's story to be implausible, the lack of corroboration in the form of newspaper stories or even a letter from his wife (the claimant alleged he had received some) was a valid consideration. See also *Herrera, Endigo Guiller Caceres v. M.C.I.* (F.C.T.D., no. IMM-27-37-97), Muldoon, September 28, 1998, where the Court found in the circumstances of that case that, since it was not presented, the CRDD was entitled to conclude the arrest warrant did not exist.

In *Kaur*, the Court said that if the Board dispenses with the need to call a witness to corroborate the claimant's testimony, it cannot then make an adverse finding of credibility because of a lack of corroboration of that testimony.[125]

(See also *Commentary on Undocumented and Improperly Documented Claimants,* IRB Legal Services, March 11, 1997, where there is a discussion, at pages 12-16, about the propriety of drawing an adverse inference from the absence of a reasonable explanation for the lack of proper documentation.[126])

### 2.4.6. Silence of Documentary Evidence

While there is no requirement of external corroboration of an uncontradicted credible account, the Court of Appeal has stated in *Adu*[127] that

> The "presumption" that a claimant's sworn testimony is true is always rebuttable, and, in appropriate circumstances, may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention.

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125 *Kaur v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 301 (F.C.T.D.).

126 In *Olojo, Omolara Abimbola v. M.C.I.* (F.C.T.D., no. IMM-3918-96), Lutfy, November 6, 1997, the Court held that the evidence did not support the CRDD's finding that the claimant had made no genuine effort to obtain corroborating documentation; furthermore, it was speculative for the Board to state that her counsel could have made the claimant aware of the importance of such documentation. In *Singh, Sajan v. M.C.I.* (F.C.T.D., no. IMM-733-97), Pinard, January 14, 1998, the Court held that, in the circumstances of that case, the claimant should have made a more significant effort to secure identity documents. In *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97), Lutfy, April 9, 1998, the Court upheld the CRDD's finding that the claimant's evidence was also lacking in that he failed to submit supporting evidence that he could have obtained. In *Chouljenko, Vladimir* v. *M.C.I.* (F.C.T.D., no. IMM-3879-98), Denault, August 9, 1999, the Court held that the CRDD did not have reasonable grounds, in light of the evidence on file of the claimant's nationality, to require that he make "sufficicient effort to obtain documents proving" his Armenian nationality.

127 *Adu, Peter v. M.E.I.* (F.C.A., no. A-194-92), Hugessen, Strayer, Robertson, January 24, 1995, pages 1-2, per Hugessen J. In *Boateng, Ewurama v. M.E.I.* (F.C.T.D., no. 92-A-6524), McKeown, June 1, 1993, the Court upheld the panel's finding, characterized as one "based on implausibility not lack of corroboration," that the claimant's alleged confrontation with Chairman Rawlings' wife was not credible because the consequent arrest of eight leading executive members of a large and important organization would have been reported on by one of the human rights monitoring agencies. See also *Osei, Gyane Nana v. M.E.I.* (F.C.T.D., no. T-2992-92), Reed, November 17, 1993; *Farahani, Fariborz Jalali v. M.E.I.* (F.C.T.D., no. IMM-3079-93), Simpson, June 1, 1994; *Mama, Salissou v. M.E.I.* (F.C.T.D., A-1454-92), Teitelbaum, October 17, 1994, upheld by (F.C.A., no. A-596-94), Stone, Décary, McDonald, May 26, 1997; *Owusu, Anthony v. M.C.I.* (F.C.T.D., no. IMM-2422-94), Wetston, May 4, 1995 (given the volume of documentary evidence, it was reasonable for the CRDD to expect corroborating reports); *Oppong, Lawrence v. M.C.I.* (F.C.T.D., no. IMM-387-95), Richard, September 6, 1995 (CRDD noted that there was a free and vocal press). Some decisions of the Trial Division have held that documents such as letters and medical reports must be considered for what they say, and not for what they do not say. See *Mahmud, Sultan v. M.C.I.* (IMM-5070-98), Campbell, May 12, 1999; *Bagri, Davinder Singh v. M.C.I.* (F.C.T.D., no. IMM-2908-98), Campbell, May 25, 1999. See also *Solis, Anastacio Roberto Vera v. M.C.I.* (F.C.T.D., no. IMM-1094-98), Evans, March 17, 1999.

Therefore, in appropriate circumstances, the fact that the documentary evidence does not confirm the claimant's testimony, or refer to an event reported by the claimant, may be grounds for rejecting the claimant's testimony.

However, caution should be exercised especially when the documentary evidence before the panel is less than comprehensive.[128] Moreover, a document containing general information may not be always sufficient to refute testimony dealing with a specific, individualized event.[129]

### 2.4.7. Self-Serving Evidence

The Board should have good reason to ignore the claimant's evidence as being "self-serving". The Court has commented in *Kimbudi* that it is difficult to conceive what evidence would be available to a claimant in Canada that would not be self-serving.[130] Consequently, it would not constitute "clear reasons" for finding evidence not to be credible, to simply refer to it as being "self-serving", without providing any further analysis.[131]

Conversely, the Court has held in *Vallejo* that the absence of "self-serving" evidence that is otherwise accorded little or no weight is "a flimsy basis for doubt."[132]

### 2.4.8. Preferring Documentary Evidence Over Claimant's Testimony

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128 *Ogbomo, Perpertual Aiwanfo v. M.C.I.* (F.C.T.D., no. IMM-5217-93), MacKay, November 22, 1994; *Osarogiagbon, Helen Iyekeoretin v. M.C.I.* (F.C.T.D., no. IMM-1326-98), Reed, June 23, 1999.

129 *Lachowski v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L.R. (2d) 134 (F.C.T.D.); *Ahortor v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 39 (F.C.T.D.); *Selvarajah, Rajkumar v. M.E.I.* (F.C.A., no. A-342-91), Heald, Stone, McDonald, April 14, 1994 (since the situation in question was of a local nature, it was not reasonable to expect specific mention thereof in the documentary evidence concerning the general situation in Sri Lanka); *Nebea v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 61 (F.C.T.D.), (the fact that some Kenyan newspapers were allowed to publish some articles critical of the government did not lead to the conclusion that the press would probably have published a story on persons persecuted for supplying information about a particular event).

130 *Kimbudi v. Canada (Minister of Employment and Immigration)* (1982), 40 N.R. 566 (F.C.A.). In *Cardenas, Harry Edward Prahl v. M.C.I.* (F.C.T.D., no. IMM-1960-98), Campbell, February 20, 1998, the Court held that the fact that corroborating letters from the claimant's family postdated the claim was not sufficient reason to dismiss them as self-serving.

131 *Konadu, Yaa v. M.C.I.* (F.C.T.D., no. A-985-92), Heald, November 20, 1996.

132 In *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993, the Court rejected the CRDD's implicit finding that the claimant was not a credible witness for the reason, among others, that, in testifying about the content of letters received from home, he stated that they did not mention that the authorities were still looking for him. The Court commented at page 7: "That is exactly the sort of evidence that the Board routinely gives little or no weight because it finds it self-serving."

The Board is entitled to rely on documentary evidence in assessing the plausibility of the claimant's testimony.[133] However, the decision-maker must provide clear reasons for accepting documentary evidence over the uncontradicted evidence of the claimant.[134]

The Federal Court has upheld, in a number of decision, the Refugee Division's reliance on documentary evidence originating from a variety of reputable, mutually independent sources, none of which can be said to have any vested interest in the claim at hand (and are to that extent free of bias), in preference to the claimant's testimony.[135]

### 2.4.9. Discounting Documents

While some cases have suggested that documents whose authenticity has not been undermined cannot be rejected,[136] other cases indicate that such documents may, in appropriate circumstances, be assigned little (or no) trustworthiness,[137] provided that the Board explains in its reasons why it did so.[138] Thus, a claimant's overall lack of credibility may affect the weight given to documentary evidence.[139]

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133 *Zhou, Ting Yu v. M.E.I.* (F.C.A., no. A-492-91), Heald, Desjardins, Linden, July 18, 1994; *Victorov, Alexey v. M.C.I.* (F.C.T.D., no. IMM-5170-94), Noël, June 14, 1995; *Andrade, Pedro Aleksei Marchant v. M.C.I.* (F.C.T.D., IMM-2361-96), Noël, May 5, 1997.

134 *Okyere-Akosah, Kwame v. M.E.I.* (F.C.A., no. A-92-91), Marceau, Desjardins, Décary, May 6, 1992. See, however, *Kandasamy, Thirunavukarasu v. M.C.I.* (F.C.T.D., no. IMM-4730-96), Reed, November 5, 1997; *Levtchenko, Seguei* v. *M.C.I.* (F.C.T.D., no. IMM-3289-97), Pinard, August 18, 1998.

135 *Zvonov v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm. L.R. (2d) 23 (F.C.T.D.); *Villalba, Juan Francisco Massaffero v. M.E.I.* (F.C.T.D., no. IMM-7172-93), Rothstein, October 19, 1994; *Chkliar, Ekaterina v. M.C.I.* (F.C.T.D., no. IMM-2991-94), Wetston, January 21, 1995; *Mihelcic, Nicola v. M.E.I.* (F.C.T.D., no. IMM-1010-94), Gibson, March 16, 1995; *Varga, Sava v. M.E.I.* (F.C.T.D., no. IMM-790-94), Heald, June 8, 1995. In *Munkoh, Frank v. M.E.I.* (F.C.T.D., no. IMM-4056-93), Gibson, June 3, 1994, the Court questioned the foregoing rationale as a sufficient basis for preferring the documentary evidence to the evidence of the claimant.

136 In *Warsame, Mohamed Dirie v. M.E.I.* (F.C.T.D., no. A-758-92), Nadon, November 15, 1993, the Court stated at pages 4-5: "The certificate is either genuine or false, and therefore it is not possible to attach 'little probative value'. It is all or nothing. ... At the very least, the Board should have stated why it believed that the document in question was not genuine as, on its face, it does appear to be genuine." See also *Olojo, Omolara Abimbola v. M.C.I.* (F.C.T.D., no. IMM-3918-96), Lutfy, November 6, 1997; *Kabashi, Sokol v. M.C.I.* (F.C.T.D., no. IMM-3489-97), Gibson, April 20, 1998 (the CRDD could not conclude that a military call-up notice and a school letter were not genuine in the absence of expert examination). In *Ramalingam, Govindasamy Sellathurai v. M.C.I.* (F.C.T.D., no. IMM-1298-97), Dubé, January 8, 1998, the Court held that an identity document issued by a foreign government is presumed valid unless evidence is produced to prove otherwise.

137 *Grozdev, Kostadin Nikolov v. M.C.I.* (F.C.T.D., no. A-1332-91), Richard, July 16, 1996; *Parvez, Mohammed v. M.C.I.* (F.C.T.D., no. A-1341-92), Gibson, October 18, 1996. In *Ahmed, Shakeel v. M.C.I.* (F.C.T.D., no. IMM-1006-97), Nadon, April 9, 1998, the Court upheld the CRDD's finding that the arrest warrant was invalid because it contained handwritten words in English and because the claimant failed to produce the First Information Report listing the actual charges, despite being given time to do so; the lawyer's letter from Pakistan had the word "legal" misspelled in the letterhead. See also *Culinescu, Rodica-Luciana v. M.C.I.* (F.C.T.D., no. IMM-3395-96), Joyal, September 17, 1997, where the Court held that there was no duty on the Board to have impugned documents authenticated.

138 In *Mandar, Kashmeer Singh v. M.C.I.* (F.C.T.D., no. IMM-4605-96), Reed, October 3, 1997, the Court cautioned the Board to seek and take into account explanations offered by the claimant regarding

### 2.4.10. Medical Reports

Generally speaking, it is open to the panel to find that opinion evidence is only as valid as the truth of the facts on which that opinion is based. Thus, if the panel does not believe the underlying facts, it is entirely open to it to assess (and discount) the opinion evidence in light of that finding.[140]

Regarding medical reports, in *Zapata*,[141] the Court noted that

> The CRDD must give appropriate weight to professional opinion directly related to the [claimant] before it and to the documentary evidence that, read together with the professional opinion, is corroborative of the position of the [claimants] or, put another way, that reflects the impact of the case specific professional opinion.

The Court found, in that case, that a medical report cannot be rejected solely for the reason that the conclusion made therein is based on what was related to the doctor by the claimant, when it is clear from the report that the doctor's own professional observation of the claimant was material to the conclusion reached.[142]

The Court has also held that, where a professional opinion as to the psychological state of the claimant and whether he was suffering from post traumatic stress disorder is submitted, this opinion cannot be rejected on the grounds that the doctor could not corroborate specifically the incidents related by the claimant, since that was not the purpose for which it was introduced.[143]

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impugned documents. In *Khan, Himmotur Rahman v. M.C.I.* (F.C.T.D., no. IMM-3428-97), Denault, August 21, 1998, the Court held that the CRDD erred by finding that the claimant was not credible about her identity in the face of numerous unchallenged documents such as birth and school certificates, and newspaper articles containing her pen name as well her photograph.

139 *Songue, André Marie v. M.C.I.* (F.C.T.D., no. IMM-3391-95), Rouleau, July 26, 1996, at page 4.

140 *Danailov (Danailoff), Vasco (Vassil) Vladimirov v. M.E.I.* (F.C.T.D., no. T-273-93), Reed, October 6, 1993; *Singh, Ranjodh v. M.C.I.* (F.C.T.D., no. IMM-2382-94), Simpson, December 14, 1995, where the CRDD did not believe the underlying facts upon which the psychiatric report was based, and preferred its own conclusions based on demeanour over the doctor's perception that the claimant's presentation was genuine; *Al-Kahtani, Naser Shafi Mohammad v. M.C.I.* (F.C.T.D., no. IMM-2879-94), MacKay, March 13, 1996. But see also *Vijayarajah v. Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm. L.R. (2d) 113 (F.C.T.D.), where the Court faulted the CRDD's reasoning in finding the claimant not credible due to inconsistencies in his testimony, and then relying on this negative credibility finding to dismiss medical and documentary evidence, which explains that torture victims may contradict themselves as a result of the confusion caused by their experiences.

141 *Zapata, Carlos Alberto Ruiz v. M.E.I.* (F.C.T.D., no. IMM-4876-93), Gibson, June 29, 1994, at page 7.

142 See also *Attigah v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm. L.R. (2d) 288 (F.C.T.D.); *Appiah, Charles v. M.C.I.* (F.C.T.D., no. IMM-3009-96), Teitelbaum, August 19, 1997. But note, however, *Sulaiman, Hussaine Hassan v. M.C.I.* (F.C.T.D., no. IMM-525-94), MacKay, March 22, 1996, where the Court upheld the CRDD's conclusion that the claimant's condition, as described in the medical report, did not account for all the inconsistencies and vagueness in her testimony in the circumstances of that case.

143 *Gill, Ram Singh v. M.E.I.* (F.C.T.D., no. 92-T-1624), Gibson, March 31, 1994.

Furthermore, a medical report cannot be rejected for the sole reason that it does not indicate that the only possible cause of the injury in question is that related by the claimant. In other words, it is sufficient that the report finds that the injury in question is consistent with the cause specified by the claimant.[144]

The need for the panel to refer, in its reasons, to medical and psychiatric reports filed in evidence will depend on the quality of that evidence and the extent to which it is central to the claim.[145] If, for example, the psychiatric report speaks to a medical disorder that may impact on the claimant's behaviour or ability to provide coherent testimony, it should be considered in the Board's reasons.

Where the medical report is cogent and relevant to the panel's findings of non-credibility, and credibility is central to the outcome of the claim, the CRDD is obliged to explain how it dealt with the report in the context of making its non-credibility finding.[146]

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144 *Thurairajah, Uthayasankar v. M.E.I.* (F.C.T.D., no. IMM-2339-93), Tremblay-Lamer, March 11, 1994.

145 In *Gosal, Pardeep Singh v. M.C.I.* (F.C.T.D., no. IMM-2316-97), Reed, March 11, 1998, the Court stated: "I am not persuaded that in all instances the Board *has to* refer to the psychiatrist's report. It will depend on the quality of that evidence and the extent to which it is central to the ... claim. When such reports are nothing more than a recitation of the [claimant's] story, which the Board does not believe, and a conclusion based on symptoms, which the [claimant] has told the psychiatrist are being experienced, then, Boards cannot be faulted for treating such reports with some degree of scepticism. When they are based on independent and objective testing by a psychiatrist, then, they deserve more consideration."

146 In *Javaid, Taher v. M.C.I.* (F.C.T.D., no. IMM-265-98), Rothstein, November 25, 1998, the Court held that, since the psychological report was specific and important to the claimant's case and, *prima facie*, credible and persuasive, it was not sufficient for the panel merely to state that it was considered; the panel had some obligation, even very briefly, to explain why it was not persuaded by that evidence. See also *Ngombo v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 321 (F.C.T.D.), where the Court held that the CRDD erred in ignoring medical evidence that might explain problems with the claimant's testimony; *Hassan, Ali Abdi v. M.C.I.* (F.C.T.D., no. IMM-5440-98), Evans, September 7, 1999.

## 2.5. ALLOWING THE CLAIMANT TO CLARIFY CONTRADICTIONS IN HIS OR HER TESTIMONY

### 2.5.1. General Principle

Generally speaking, there is no obligation on the tribunal to signal its conclusions on the general credibility of the evidence.[147] In some cases, however, failure to examine a witness on some material part of his or her evidence has been treated as an acceptance of the truth of that part of the evidence.[148]

### 2.5.2. Contradictions or Inconsistencies Internal to Claimant's Testimony

The Federal Court has held, in *Gracielome* and other cases, that the Refugee Division should afford the claimant (and any other witness) an opportunity to clarify the evidence and to explain apparent contradictions or inconsistencies within that person's testimony.[149] The same principle applies to inconsistencies between the claimant's oral testimony and the Personal Information Form (PIF) or port of entry notes, as well as with respect to omissions therein.[150]

Some recent case law of the Trial Division, however, has moved away from a rote application of this principle.[151] In *Ngongo,*[152] the Court set out some factors to consider in deciding whether the CRDD is required, in a particular case, to confront the claimant with contradictions in his or her testimony.

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147 In *Parameshvaran, Appudurai v. M.C.I.* (F.C.T.D., no. IMM-4131-94), Richard, June 26, 1995, the Court held that a tribunal does not have an obligation to point out those aspects of the claimant's testimony that it finds unconvincing. See also *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 209 (F.C.T.D.).

148 *Browne v. Dunn* (1993), 6 R. 67 (H.L.) holds that, in a civil context, where a tribunal is asked to disbelieve a witness, the witness should be cross-examined. In *Chehar, Kathirgamalingam v. M.C.I.* (F.C.T.D., no. IMM-4540-96), Wetston, October 20, 1997, the Court interpreted *Gracielome, infra,* to stand for the proposition that the Board must afford the claimant the opportunity to address key issues upon which the Board intends to rely.

149 *Gracielome v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 237 (F.C.A.). See also *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Grewal, Kala Singh v. M.E.I.* (F.C.A., no. A-532-91), Mahoney, Robertson, Gray, January 27, 1993; *Nti, Kofi v. M.E.I.* (F.C.T.D., no. 92-T-1592), McKeown, May 19, 1993; *Vorobieva, Svetlana v. S.G.C.* (F.C.T.D., no. IMM-4863-93), Rouleau, August 15, 1994; *Nadesu, Balaranjani v. M.C.I.* (F.C.T.D., no. IMM-4606-96), Wetston, October 21, 1997.

150 *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. (F.C.A). In *Li, Ta Wei v. M.E.I.* (F.C.T.D., no. A-1181-92), Jerome, February 28, 1996, the Court held that the Refugee Division erred in not confronting the claimant with their doubts about the claimant's credibility arising from the omission in the PIF of any reference to an arrest warrant which was the subject of his testimony. In *Bayrami, Javad Jamali v. M.C.I.* (F.C.T.D., no. IMM-3904-98), McKeown, July 22, 1999, the Court faulted the CRDD for failing to offer the claimants an opportunity to explain the difference in their PIF and the port of entry notes.

151 In *Parameshvaran, Appudurai v. M.C.I.* (F.C.T.D., no. IMM-4131-94), Richard, June 26, 1995, the Court held that the principles of procedural fairness and natural justice were not offended when the claimant was not confronted with the inconsistencies in his testimony as he was made aware of the credibility issue and had ample opportunity to explain any inconsistencies in his testimony. In *Liu v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 168 (F.C.T.D.), the Court held that, while it would have been preferable for the CRDD to have drawn to the claimant's attention *all* of the inconsistencies in his testimony, its failure to do so was not, in the circumstances of that case, a breach of

In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:

1.

### 2.5.3. Lack of Detail in Claimant's Testimony

In *Danquah*,[155] a case where the concern arose respecting a lack of detail in the claimant's account, the Court stated:

> Nor am I persuaded that the tribunal was unfair in its process in not alerting the [claimant] at the time of her hearing, of its concerns about the weakness of detail in her testimony about these matters. There was no instance of inconsistency in the [claimant's] evidence relied upon by the tribunal, which it ought in fairness to have brought to the attention of the claimant. A hearing tribunal has no obligation to point to aspects of the [claimant's] evidence that it finds unconvincing where the onus is on the [claimant] to establish a well-founded fear of persecution for reasons related to Convention refugee grounds.

(See also 2.6.3. Assessing the Evidence.)

### 2.5.4. Documentary Evidence

In *Osei*,[156] where the credibility concern was not related to contradictions or inconsistencies internal to the claimant's testimony, but rather to an assessment of the claim in light of the documentary evidence concerning country conditions, the Court stated:

> I do not think [the Tribunal] was required to inform the [claimant], before finally rendering its decision, that it doubted the existence of the D.M.L.G. and give the [claimant] an opportunity to respond to that conclusion. I think that this is a different kind of situation from conflicting evidence coming out of the [claimant's] own mouth. In the latter situation, the Tribunal is expected generally to confront the [claimant] with the contradictions.

However, where personal or other documents presented by the claimant are in issue, the Court has taken diverse approaches and has often required that the claimant be afforded an opportunity to explain concerns raised by the CRDD.[157]

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155 *Danquah, Ama v. S.S.C.* (F.C.T.D., no. IMM-105-94), MacKay, November 17, 1994, at pages 2-3.

156 *Osei, Gyane Nana v. M.E.I.* (F.C.T.D., no. T-2992-92), Reed, November 17, 1993, at pages 3-4. See also *Belhadj, Rachid v. M.E.I.* (F.C.T.D., no. A-779-92), Tremblay-Lamer, February 17, 1995, where the Court found that there was no duty on the Refugee Division to confront the claimant on contradictions between his testimony and the documentary evidence; *Gutkovski, Alexander v. S.S.C.* (F.C.T.D., no. IMM-746-94), Teitelbaum, April 6, 1995, where the Court held that the Refugee Division was not obliged to advise the claimants of its concerns relating to foreign language press articles (which were not translated in their entirety and not accompanied by a translator's certificate or signature); *Victorov, Alexey v. M.C.I.* (F.C.T.D., no. IMM-5170-94), Noël, June 14, 1995, where the Court held that there was no requirement on the panel to confront the claimants with the documentary evidence on country conditions used to diminish their credibility; *Ortiz, Hector Andres Gonzalez v. M.C.I.* (F.C.T.D., no. IMM-2485-96), Pinard, June 4, 1997 (to the same effect).

157 In *Apraku, Cecilia v. M.E.I.* (F.C.T.D., no. 92-T-1373), McKeown, June 23, 1993, the Court held that there was no requirement on the part of the credible basis tribunal to raise the question of the discrepancy between two medical reports filed by the claimant. See also *Tshimanga, Pita v. M.C.I.* (F.C.T.D., no. IMM-3915-98), Rouleau, June 10, 1999, where the Court held that there was no duty to confront the claimant with its doubts about a letter from his political organization which contradicted his testimony. However, in *Muthusamy, Lingam v. M.E.I.* (F.C.T.D., no. IMM-5801-93), Cullen, September 14, 1994, the Court held that the CRDD erred by failing to give the claimant an opportunity to explain the contents

### 2.5.5. Implausibilities

With respect to implausibilities, the Court stated in *Nkrumah*:[158]

> where the panel's inferences are based on what seem to be "common sense" or rational perceptions about how a governmental regime in another country might be expected to act or react in a given set of circumstances, there is an obligation, out of fairness, to provide an opportunity for the [claimant] to address those inferences on which the panel relies.

However, in other decisions, the Trial Division has held that the CRDD is under no obligation to alert the claimant of its concerns about weaknesses of testimony giving rise to implausibilities.[159]

In *Arumugam*,[160] the Court attempted to reconcile these lines of authority when it stated:

> Board's [sic] cannot simply draw implausibilities "out of a hat". They must be founded on the evidence. If they are clearly highly speculative and a claimant has not been given an opportunity to address them, a reviewing Court will give the conclusion little weight. If they are firmly founded in and supported by the evidence they of course will be given greater weight.

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of a videotape viewed by the CRDD outside the hearing, and to answer concerns that arose from its viewing; furthermore, the CRDD had a duty to alert the claimant about its concerns about the accuracy of the translation and the authenticity of identity documents. In *Chaudary, Imran Akram v. M.C.I.* (F.C.T.D., no. IMM-2048-94), Reed, May 4, 1995, the Court held that the Refugee Division erred in finding two letters not authentic without giving the claimant an opportunity to explain certain typography (the Court also raised a concern about imposing Canadian standards of typography). In *Guo, Yu Lan v. M.C.I.* (F.C.T.D., no. A-928-96), Heald, September 16, 1996, the Court held that the CRDD erred in not confronting the claimant regarding inconsistencies between her testimony and her Chinese work unit card and a PSB (Public Security Bureau) list of seized items attached to her PIF. In *Gabor v. Canada (Minister of Citizenship and Immigration)* (1998), 47 Imm. L.R. (2d) 201 (F.C.T.D.), the Court held that the CRDD should have sought clarification from the claimant as to why the military call-up notice referred to at hearing, but submitted post hearing, was dated after the hearing. (The Court certified a question regarding that matter.)

158 *Nkrumah v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 246 (F.C.T.D.), at 249. There are other cases which hold that the claimant should have been afforded an opportunity to explain why the claimant or others behaved in a particular way. See *Aden, Ibrahim Ali v. M.E.I.* (F.C.A., no. A-813-91), Hugessen, MacGuigan, Décary, April 28, 1993 (failure to obtain medical treatment); *Chand, Saroop v. M.E.I.* (F.C.T.D., no. 92-T-2035), Gibson, January 26, 1994; *Chehar, Kathirgamalingam v. M.C.I.* (F.C.T.D., no. IMM-4540-96), Wetston, October 20, 1997; *Espino, Cesar Pedro Guerra v. M.C.I.* (F.C.T.D., no. IMM-3958-97), Pinard, May 25, 1998; *Solis, Mario Rene Estrada v. M.C.I.* (F.C.T.D., no. IMM-3627-97), Wetston, September 17, 1998.

159 *Appau, Samuel v. M.E.I.* (F.C.T.D., no. A-623-92), Gibson, February 24, 1995; *Akinremi, Oluwatosin Ololade v. M.C.I.* (F.C.T.D., no. IMM-726-94), Simpson, May 25, 1995; *Akinlolu, Grace Adefunke v. M.C.I.* (F.C.T.D., no. IMM-551-96), MacKay, March 14, 1997; *Tchaynikova, Olga v. M.C.I.* (F.C.T.D., no. IMM-4499-96), Richard, May 8, 1997; *Matarage, Lal Kumara Chandragupta v. M.C.I.* (F.C.T.D., no. IMM-1987-97), Lutfy, April 9, 1998; *Sarker v. Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 209 (F.C.T.D.).

160 *Arumugam, Kandasamy v. M.E.I.* (F.C.T.D., no. IMM-1406-93), Reed, January 20, 1994, at page 2.

## 2.6. TAKING THE CHARACTERISTICS OF THE PROCESS INTO ACCOUNT

### 2.6.1. Hearing Procedures

The refugee determination process is one which is not like most other judicial processes in our legal system. It is specifically designed to be expeditious, informal, non-adversarial and investigative in nature. The "normal" rules of evidence do not apply. It involves the use of the Members' "specialized knowledge". Almost all of the oral evidence is received through the filter of interpreters. The end result of all of these "unusual" characteristics is that the process is fraught with the possibility of misunderstanding, even among people acting in good faith.[161]

### 2.6.2. Special Circumstances of the Claimant

Nervousness caused by testifying before a tribunal,[162] the trauma and other inherent difficulties associated with testifying about a trying events such as detention or torture,[163] the claimant's experiences with officials in the home country, the claimant's young age,[164] the claimant's sex,[165] and the claimant's educational background[166] and social position,[167] or other cultural factors,[168] for

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161 *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.); *Rajaratnam* v. *Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

162 *Vallejo, Juan Ernesto v. M.E.I.* (F.C.A., no. A-799-90), Mahoney, Stone, Linden, March 26, 1993; *Epane, Florent v. M.C.I.* (F.C.T.D., no. IMM-974-98), Rouleau, June 17, 1999.

163 *Reyes, Hugo Hernan Cruz v. M.E.I.* (F.C.A., no. A-59-91), Mahoney, Stone, Linden, March 23, 1993; *Bains v. Canada (Minister of Employment and Immigration)* (1993), 20 Imm. L.R. (2d) 296 (F.C.T.D.). In *Miral, Stefnie Dinisha v. M.C.I.* (F.C.T.D., no. IMM-3392-97), Muldoon, February 12, 1999, the Court commented: "Although it is the function of the CRDD to determine credibility, in this instance the panel appears to have imposed too high a standard regarding the amount of detail he [sic] required from her, forgetting, or perhaps overlooking, the fact that [police] interrogations such as those experienced by the [claimant] are designed to blur and blend together in the minds of those interrogated."

164 *Uthayakumar, Sivakumar v. M.C.I.* (F.C.T.D., no. IMM-2949-98), Blais, June 18, 1999. See also *Child Refugee Claimants: Procedural and Evidentiary Issues,* Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act,* September 30, 1996.

165 In *Griffith, Marion v. M.C.I.* (F.C.T.D., no. IMM-4543-98), Campbell, July 14, 1999, the Court stated that in the case of credibility findings with respect to women suffering domestic violence, the reasons must be responsive to what is known about women in this condition, and cited with approval the Board Chairperson's Gender Guidelines (*Women Refugee Claimants Fearing Gender-Related Persecution: Update,* Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act,* November 25, 1996).

166 *Ngombo, Sunda v. M.C.I.* (F.C.T.D., no. IMM-1874-96), Gibson, January 31, 1997.

167 In *Roble v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 186 (F.C.T.D.), the Court noted that the CRDD failed to consider the fact that the claimant was not a highly educated person and that in Somali culture, it is often the case that a wife is not privy to information concerning her husband's occupation; thus the panel's aggressive questions may have contributed to her evasiveness and hesitancy. In *Montenegro, Suleyama v. M.C.I.* (F.C.T.D., no. IMM-3173-94), MacKay, February 29, 1996, at page 5, the Court faulted the CRDD for ignoring the claimant's explanation that her knowledge of her father's political involvement in El Salvador was based entirely on what he had been

example, may play a role in creating confusion or misunderstandings. Thus, all of these "unusual" characteristics have to be taken into account when assessing the credibility of the claimant's or a witness's evidence.

### 2.6.3. Assessing the Evidence

The Court has cautioned the Board that it should not display excessive zeal in an attempt to find contradictions in the claimant's testimony.[169] In *Attakora*, the Court of Appeal recognized that, while Members have a difficult task when assessing credibility, the Board "should not be over-vigilant in its microscopic examination of persons who ... testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe."[170]

In *Mensah*, the Court made it clear that it is important that the claimant not be placed in a "Catch 22" situation by finding that the claimant is not credible if either too many details or not enough details are provided.[171] Thus, if at the hearing the claimant testifies to matters that had not been submitted earlier (for example, in the examination under oath or during the port of entry examination before an immigration officer) or otherwise varies his or her testimony, the decision-maker must question the claimant on those points and assess the responses provided in light of any other evidence before finding that the new evidence has been concocted.[172]

In *Sasan*, the Court cautioned that, in order to avoid factual errors (caused by delay) and the Court questioning credibility decisions for this reason, the CRDD should ensure that its decisions are issued in a timely manner.[173]

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willing to tell her, pointing out that "within their social order wives were not expected to question their husbands' activities."

168 In *Miwa, Geoffrey v. M.C.I.* (F.C.T.D., no. IMM-3457-98), Rouleau, June 10, 1999, the Court believed that cultural differences and the use of an interpreter could colour the interpretation of allegedly conflicting identity documents. See also *Osarogiagbon, Helen Iyekeoretin v. M.C.I.* (F.C.T.D., no. IMM-1326-98), Reed, June 23, 1999.

169 *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Armson v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 150 (F.C.A.); *Lai v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 245 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

170 *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.), at 169, per Hugessen J.A.

171 *Mensah, George Akohene v. M.E.I.* (F.C.A., no. A-1173-88), Pratte, Hugessen, Desjardins, November 23, 1989.

172 *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.); *Kassa v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 1 (F.C.A.); *Boakye, Comfort Duodo v. M.E.I.* (F.C.A., no. A-562-91), Mahoney, Robertson, Gray, January 26, 1993.

173 *Sasan, Ahmadian v. M.C.I.* (F.C.T.D., no. IMM-1179-97), Rothstein, January 6, 1998, where the CRDD heard the claim in October 1995 and August 1996, and issued its decision in March 1997. (The CRDD had made three significant factual errors in stating the evidence.) See also *Bukaka-Mabiala, Aime v. M.C.I.* (F.C.T.D., no. IMM-4296-98), Rouleau, June 18, 1999, where the Court noted that, in view of the

### 2.6.4. Questioning the Claimant

In assessing credibility, the Court pointed out asking questions in order to clarify the evidence, and even extensive questioning of the claimant by the members can be proper, and does not constitute grounds for a finding of a reasonable apprehension of bias.[174] Board members have a duty to get at the truth concerning the claims they hear.[175]

However, the Court found in other cases that there may be circumstances where the questioning is overly aggressive or otherwise improper or, rather than clarifying, leads to considerable confusion in the transcript.[176] Such conduct may give rise to an apprehension of bias on the part of the tribunal and a breach of natural justice.

### 2.6.5. Filter of Interpreter

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six-month delay between the conclusion of the hearing and the issuance of the decision, a finding of "evasiveness" had to be based more on the Board members' notes than on their immediate impression of the claimant's demeanour and conduct when testifying, and thus subject to greater scrutiny.

174 *Mahendran v. Canada (Minister of Employment and Immigration)* (1991), 14 Imm. L.R. (2d) 30 (F.C.A.), leave to appeal to S.C.C. dismissed February 20, 1992; *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.); *Virk v. Canada (Minister of Employment and Immigration)* (1992), 140 N.R. 290 (F.C.A.); *Singh, Teja v. M.E.I.* (F.C.T.D., no. 92-T-1537), Joyal, January 10, 1994; *Carmona, Teresita Zepeda v. M.E.I.* (F.C.T.D., no. A-1333-92), Nadon, March 22, 1995; *Singh, Ranjit v. M.C.I.* (F.C.T.D., no. A-605-92), Reed, July 23, 1996; *Vijayarajah v. Canada (Minister of Citizenship and Immigration)* (1999), 50 Imm. L.R. (2d) 113 (F.C.T.D.).

175 In *Maksudur, Rahman v. M.C.I.* (F.C.T.D., no. IMM-5784-98), Nadon, September 8, 1999, the Court stated: "In most refugee claims, the prime issue, if not the only issue, is whether the story related by the [claimant] is true. Consequently, Board members have a duty to the [claimant] and to Canada to employ their best endeavours in the pursuit of that goal. ... to discover the truth." In this case, the Court found that the Board members and counsel "did not appear to be interested in posing sufficient questions so as to enable them to determine whether, in fact, the [claimant] was telling a true story. The answers given by the [claimant], throughout his evidence, are vague and unresponsive. The answers provide 'generalities', but no specifics. Part of the reason for this is the inability of those questioning to pose proper questions to the [claimant]."

176 *Yusuf v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 629 (C.A.); *Sivaguru v. Canada (Minister of Employment and Immigration)* (1992), 16 Imm. L.R. (2d) 85 (F.C.A.); *Membreno-Garcia v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 291 (F.C.T.D.), where the Court commented adversely on the "frequent interruptions" by the panel members; *Mohamed, Haweya Abdi* v. *M.E.I.* (F.C.A., no. A-43-91), Mahoney, MacGuigan, Linden, February 11, 1993, where the Court stated at pages 1-2: "The transcript of the hearing ... is a shambles, largely due to the aggressive intervention of the members of the panel throughout." See also *Castillo, Leonardo Patino del v. M.E.I.* (F.C.T.D., no. IMM-1431-93), Nadon, April 15, 1994; *Zheng v. Canada (Minister of Employment and Immigration)* (1994), 28 Imm. L.R. (2d) 191 (F.C.T.D.); *Mena, Roberto Antonio Polanco v. M.C.I.* (F.C.T.D., no. IMM-4506-94), Reed, May 12, 1995; *Ganji v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 95 (F.C.T.D.), where the Court held that the CRDD had seized control of the claimant's case over the thwarted objection of the claimant's designated representative; *Alam, Mohd Saeed v. M.C.I.* (F.C.T.D., no. IMM-4362-96), Rouleau, December 5, 1997, where the persistent questioning of the claimant in the circumstances of this case could, in the Court's opinion, lead to confusion.

The Court has addressed the point that Board Members must take into account the fact that the claimant is heard and questioned through an interpreter and that innocent misunderstandings are possible.[177] The same considerations apply to a PIF completed by a claimant with poor language skills.[178]

Furthermore, the Court has noted that Board Members must ensure that the interpreter is competent and provides a complete and accurate rendering of the testimony.[179]

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177 *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 106 (F.C.A.); *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.).

178 *Benaissa, Karim v. M.C.I.* (F.C.T.D., no. IMM-1339-96), Jerome, April 18, 1997. But see *Bourouisa, Moussa v. M.C.I.* (F.C.T.D., no. IMM-1809-96), Nadon, May 23, 1997.

179 *Ming v. Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 336 (C.A.), also reported as *Xie v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm. L.R. (2d) 284 (F.C.A.); *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388 (F.C.A.). In *Lin, Zhen Shan v. M.C.I.* (F.C.T.D., no. IMM-5261-98), Evans, July 16, 1999, the Court held that the claimant was prejudiced when the Board did not try to obtain an interpreter who could understand the prayers, recited in an antiquated form of his dialect, that the claimant wanted the Board to hear, and which may have persuaded the Board about the claimant's knowledge of religious practice and overcome other credibility concerns.

## 3. A FINDING OF "NO CREDIBLE BASIS"

(See also the CRDD *Reference Paper on findings of "No Credible Basis"*, Legal Services, IRB, November 17, 1999.)

### 3.1. Legislation

Section 69.1(9.1) of the *Immigration Act* provides:

> 69.1 (9.1) If each member of the Refugee Division hearing a claim is of the opinion that the person making the claim is not a Convention refugee and is of the opinion that there was no credible or trustworthy evidence on which that member could have determined that the person was a Convention refugee, the decision on the claim shall state that there was no credible basis for the claim.

### 3.2. Notice to Claimant Not Required

The Federal Court of Appeal has held that the CRDD is *not* required to give the claimant any special notice before it finds that there was "no credible basis" for the claim and applies section 69.1(9.1).[180]

### 3.3. Application of Provision

In order for this provision to apply, *each* member hearing the claim must find that:

(1) the claimant is not a Convention refugee; and
(2) there was no credible or trustworthy evidence on which the claimant could have been determined to be a Convention refugee.

The concepts of credible basis and credible evidence are interrelated, as a finding of "no credible basis" can be made only if each member hearing a claim is of the opinion that there was no credible or trustworthy evidence on which that member could have determined the claimant to be a Convention refugee. However, the Federal Court of Appeal noted in *Sheikh* that while "credibility" and "credible evidence" are related concepts, they are not identical.[181]

With respect to the second requirement, caution should be exercised when assessing whether there is *no* credible or trustworthy evidence. Even if the evidence of the claimant is found not to be credible and trustworthy, the panel would have to be satisfied that there is also no other reliable evidence on which it could be determined that the claimant is a Convention refugee.[182]

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180 *Canada (Minister of Citizenship and Immigration) v. Mathiyabaranam* (1997), 41 Imm. L.R. (2d) 197 (F.C.A.); *Manimaran, Gayathiri v. M.C.I.* (F.C.A., no. A-414-95), Létourneau, Rothstein, McDonald, May 22, 1999.

181 In *Sheikh v. M.E.I.*, [1990] 3 F.C. 238 (C.A.), the Court stated that a tribunal's finding that the claimant is not a credible witness may amount to a finding of no credible evidence, where the only evidence before the tribunal linking the claimant to his or her claim is that of the claimant him or herself (in addition, perhaps, to general documents such as country reports from which nothing about the claim can be directly deduced).

The Court has held that a general finding of lack of credibility can be the basis for the application of section 69.1(9.1) of the Act.[183] It appears that this provision can also apply where the Board's decision is based mostly on documentary evidence and not strictly on the claimant's personal credibility.[184] The Court also let stand a Refugee Division decision where the "no credible basis" finding was based on a lack of nexus to a Convention ground.[185]

No separate reasons need to be given for a finding of "no credible basis". A tribunal's as per section 69.1(9.1) can be supported by the same sufficient reasons given in the decision in support of its finding that the claimant is not a Convention refugee.[186]

### 3.4. Consequences to Claimant of Applying this Provision

There are two serious consequences for the claimant of a decision that there was "no credible basis" for the claim:

(1) Pursuant to section 49(1)(f) of the *Immigration Act*, the claimant is permitted to stay in Canada for only seven days after a removal order becomes effective. The failed claimant may, however, apply to the Court for a stay of removal, on a case-by-case basis. (In most other cases, the claimant can remain in Canada during judicial review proceedings under the *Federal Court Act*.)

(2) The claimant is not eligible for consideration under the "Post-Determination Refugee Claimants in Canada Class" ("PDRCC").[187]

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182 In *Seevaratnam, Sukunamari v. M.C.I.* (F.C.T.D., no. IMM-3728-98), Tremblay-Lamer, May 11, 1999, the Court noted the distinction between those cases where the only evidence linking the claimant to the claim comes from the claimant's own testimony and the claimant is not credible, and those cases where there is independent, credible evidence which could serve as the essential link despite the claimant's own lack of credibility.

183 *Herve, Mwamba v. M.C.I.* (F.C.T.D., no. IMM-1028-98), Tremblay-Lamer, February 5, 1999.

184 *Gonzalez, Raul del Carmen Arredondo v. M.C.I.* (F.C.T.D., no. IMM-2719-97), Dubé, June 25, 1998, where a question was certified relating to this issue.

185 *Gomez, Jose Luis Torres v. M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999.

186 *Gomez, Jose Luis Torres v. M.C.I.* (F.C.T.D., no. IMM-1826-98), Pinard, April 29, 1999.

187 See para. (a)(iii) of the definition of "member of the post-determination refugee claimants in Canada class," *Immigration Regulations, 1978*, s. 2(1).

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